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Prior Restraints on Demonstrations

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[W]isdom cries out in the streets, and no man regards it.
—William Shakespeare[1]

I. INTRODUCTION

As recently as seven years ago, the Supreme Court could characterize a mass demonstration of 187 blacks at a Southern state capitol as "an exercise of . . . basic constitutional rights in their most pristine and classic form."[2] In retrospect, the choice of the adjective "pristine" to describe the phenomenon of mass protest seems to have been itself pristine, if not naive. The remark is instructive, however, in that it reveals how the current constitutional doctrine governing mass demonstrations was formulated in a quite different protest era, guided in large part by an almost idyllic imagery: the polite, if persistent, Jehovah's Witness; the stoic, disciplined (and well-financed) Freedom Marchers; the unsophisticated, highly visible Southern police bully. With the spotlight shifted to the Weathermen and the Hard-Hats, the Vietnam Moratorium and the Chicago Parks Department, it may be that the inherited constitutional doctrines are no longer adequate.

Some of those doctrines have to do with the special problem of prior restraints—most significantly, permit requirements and injunctions. Presently, these regulatory devices are subject to only the most amorphous of constitutional controls. Although the Supreme Court has favored street protestors with volumes of rhetoric and numerous after-the-fact legal victories, it has contributed virtually nothing in the way of concrete standards and procedures that have any impact when constitutional protection is most needed —before and during the demonstration. With regard to substantive standards, the Court has failed to recognize some of the more difficult issues, has written unintelligibly on others, and, in the one important area where it has formulated doctrine carefully, has

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1. THE FIRST PART OF THE HISTORY OF KING HENRY THE FOURTH, act 1, sc. 2, *ll.* 73-74 (H. Richmond ed. 1967).

2. Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

selected a standard that gives local officials virtually unlimited authority.[3] In the procedural realm, the Court has hinted in dictum that prior restraints on demonstrations will be measured against the developing standards of "first amendment due process,"[4] but no significant breakthrough, much less a comprehensive approach, has yet materialized.

The starting point for the analysis that follows is the belief that new constitutional doctrine—both substantive and procedural—is urgently needed. That conclusion rests on two critical assumptions—assumptions which may not be shared by others who read history differently,[5] or who have had different personal experiences regarding prior restraints on demonstrations, or who have different behavioral impressions based on observation and conversation, or best of all, who have quantitative data on the problem.

The first assumption is that the mass protest demonstration is, and should be, a full-fledged member of the first amendment pantheon. It is true that the Court has classified mass demonstrations as "speech plus,"[6] but that categorization, if it has any utility at all,[7] relates to the need for a different first amendment standard based on the presence of unusually tangible and serious countervailing regulatory interests which may not be adequately protected by a test such as "clear and present danger"; "speech plus" does not suggest that the speech component is any less important, or that the constitutional presence should be any less commanding.

There are many reasons why demonstrations should qualify for unadulterated first amendment protection. One is the specific wording of the constitutional text: "the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Another is the fact that political persuasion in the second half of the twentieth century is closely related to media exposure; demonstrations, rightly or wrongly, attract the television cameras and result in the airing of slogans—if not cogent critiques—that would not otherwise penetrate into the inner reaches of Middle America. It might

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3. *See* text accompanying notes 17-33 *infra.*

4. *See* text accompanying notes 200-06 *infra.*

5. *See generally* E. HOBSBAWM, PRIMITIVE REBELS (1965); G. RUDÉ, THE CROWD IN HISTORY (1964); THE HISTORY OF VIOLENCE IN AMERICA, A REPORT SUBMITTED TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (H. Graham & T. Gurr ed. 1969). *See also* G. LEBON, THE CROWD (2d ed. 1968); N. SMELSER, THEORY OF COLLECTIVE BEHAVIOR (1963).

6. Cox v. Louisiana, 379 U.S. 536, 555 (1965).

7. *See* Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 SUP. CT. REV. 1, 25.

also be suggested that mass gatherings provide some index of the breadth and depth of sentiment on a particular issue, information that can be useful to the guardians of the old order as well as to proponents of change. A freedom-of-association argument can be fashioned, pointing to the role demonstrations play in helping the disparate adherents to a cause meet each other, raise funds, and sometimes discover an unexpected unity and momentum. To the extent that the first amendment is concerned with self-actualization —with free expression in a more psychological sense—the physical "step forward" can be an important moment, as Billy Graham, among others, can attest. It is no doubt true that mass demonstrations can be politically counter-productive, but that would seem to be a determination best left to the protestors themselves.

The second important assumption is that political and social pressures are especially intense during disputes over demonstrations —so much so that every effort should be made to have the issues decided according to previously established doctrines that are as specific and conclusive as is feasible, and also by tribunals that are as immune as possible from those pressures by virtue of tenure, geographic remoteness, or multimember constitution. Such virtues as "detachment," "objectivity," and "neutrality" can never be achieved in any absolute sense—and they can be pursued only at a sacrifice of flexibility, intuitive judgment, and "realism." The trade-off will not always be salutary, particularly in those problem areas, including demonstration regulation, for which the fact situations are unusually varied and the costs of unrealistic decisions unusually high. But that determination should not be made in the abstract or in general; an issue-by-issue analysis is required.

II. The Substantive Standards—Possible Reasons for Prohibiting Demonstrations

It used to be that municipalities could prohibit demonstrations on public property at whim; all that was necessary was an assertion of the prerogatives traditionally associated with the private ownership of land. The doctrine had its genesis in a characteristic effort by Justice Holmes, then on the Massachusetts supreme court, to solve a difficult first amendment problem by simplistic resort to a common-law concept: "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house."[8] Forty-two years later,

8. Davis v. Massachusetts, 162 Mass. 510, 511 (1895), *aff'd.*, 167 U.S. 43 (1897).

Justice Roberts responded to Holmes in kind, finding his own simplistic succor in the common-law doctrines of adverse possession and public trust: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[9] The Roberts approach has prevailed, so much so that the Supreme Court recently held that even privately owned shopping centers must show a good deal more than "naked title" in order to prohibit protest activities.[10]

Beyond the rhetoric and the generalities and the superficial private-law analogies which have dominated judicial discussion of the problem of demonstrations on public land, there lie some extraordinarily difficult value conflicts—conflicts that the courts have barely begun to face up to in any meaningful way. For purposes of analysis, the issues may be defined in terms of the possible reasons a municipality may have for refusing to allow a proposed demonstration. At least eight such reasons can be imagined: (1) competing public uses; (2) the message of the demonstration; (3) the purpose of the demonstration; (4) the fear of a hostile audience; (5) the past conduct of the applicants; (6) an immediate background of violence; (7) failure by the demonstrators to make a timely application for a permit; and (8) the applicants' refusal or inability to pay the costs associated with the demonstration.

A. *Competing Public Uses*

A decision to grant a demonstration permit is a decision to allocate to the applicants' use a number of limited public resources. While the streets and parks may "belong to the people," as the slogan has it, the people usually want to use those streets and parks for purposes other than demonstrating—driving, parking, strolling, shopping, playing, gossiping, relaxing, contemplating. The people, moreover, generally prefer to deploy their policemen in crime-ridden neighborhoods rather than on parade routes or at rally sites. The individual and societal interest in expression, including mass demonstrative expression, and the danger of bias against unpopular elements of the community, make the problem of prior restraints on demonstrations one of constitutional dimension; but that should not obscure the fact that the problem is primarily a question of resource allocation among competing, legitimate interests rather than a matter

9. Hague v. CIO, 307 U.S. 496, 515 (1939).

10. Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324 (1968).

of irreducible, fundamental rights. Even absolutists must retreat in the face of Harry Kalven's "unbeatable proposition that you cannot have two parades on the same corner at the same time."[11]

When one recognizes, as has the Supreme Court,[12] that the proper rubric is resource allocation, the constitutional issue turns out to be one of specificity and proof: how must the competing public uses be characterized and quantified before the courts will be satisfied that the free speech interest has been given its due? Although the Court has invalidated many permit systems dealing with handbills,[13] solicitations,[14] soundtrucks,[15] and mass gatherings,[16] virtually all of those regulatory schemes failed utterly to articulate any standards for ruling upon the permit applications. Only two Supreme Court decisions have dealt with demonstration permit systems that attempted to establish issuance criteria in terms of competing public uses, and in both cases the question was the validity of the permit scheme on its face, and not the propriety of a specific injunction or permit denial.

In *Cox v. New Hampshire*[17] the Supreme Court upheld a statute which, as interpreted by the New Hampshire supreme court, required the issuance of a permit "if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such conditions or changes in time, place and manner as would avoid disturbance."[18] The Court's holding has two important features. First, at least in order to be held valid on its face, the scheme need require no finding more specific or concrete than "undue" disturbance of public "convenience." Second, the city can insist on "conditions or changes" with respect to time, place, and manner of the demonstration if such changes would "avoid disturbance," presumably even if the time, place, and manner preferred by the applicants would not create an *undue* disturbance.

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11. Kalven, *supra* note 7, at 25.

12. Cox v. Louisiana, 379 U.S. 536, 554-55 (1965).

13. *See, e.g.*, Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. Town of Irvington, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

14. *See, e.g.*, Staub v. City of Baxley, 355 U.S. 313 (1958); Largent v. Texas, 318 U.S. 418 (1943); Jones v. Opelika, 319 U.S. 103 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

15. *See, e.g.*, Soia v. New York, 334 U.S. 558 (1948).

16. *See, e.g.*, Niemetko v. Maryland, 340 U.S. 268 (1951); Hague v. CIO, 307 U.S. 496 (1939).

17. 312 U.S. 569 (1941).

18. State v. Cox, 91 N.H. 137, 146, 16 A.2d 508, 513 (1940), quoted at 312 U.S. at 576.

At issue in *Shuttlesworth v. City of Birmingham*[19] was the following standard: "The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused."[20] While acknowledging the special regulatory problems presented by mass gatherings, the Court nonetheless found the handbill cases[21] controlling for the constitutional requirement of "narrow, objective, and definite standards to guide the licensing authority,"[22] and held that the Birmingham ordinance did not measure up to that requirement: "[E]ven when the use of its public streets and sidewalks is involved . . . a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community."[23] Lest it be thought, however, that lack of specificity was the defect, it should be noted that the Court withheld condemnation of the other criteria in the Birmingham ordinance—"peace," "health," "good order," "convenience"—and also that the opinion described the disapproved criteria as "entirely unrelated to legitimate municipal regulation of the public streets and sidewalks."[24] Another pregnant omission was the Court's failure to say anything about the provision giving the licensing officials apparently plenary power to prescribe "the streets or other public ways which may be used therefor."[25]

Probably the most significant part of the *Shuttlesworth* opinion, however, is its dictum. The Alabama supreme court had attempted to save the Birmingham ordinance by means of a "remarkable job of plastic surgery,"[26] incorporating word-for-word the standard approved in *Cox v. New Hampshire*—"the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed."[27] The Supreme Court refused to recognize this gloss of

19. 394 U.S. 147 (1969).

20. BIRMINGHAM, ALA., CODE § 1159 (1944), quoted at 394 U.S. at 149-50.

21. *See* note 13 *supra*.

22. 394 U.S. at 151.

23. 394 U.S. at 153.

24. 394 U.S. at 153.

25. BIRMINGHAM, ALA., CODE § 1159 (1944), quoted at 394 U.S. at 149.

26. 394 U.S. at 153.

27. Shuttlesworth v. City of Birmingham, 281 Ala. 542, 546, 206 S.2d 348, 352 (1967), quoted at 394 U.S. at 154.

the Alabama court for a number of contorted reasons,[28] but did gratuitously "assume . . . that the ordinance as now authoritatively construed would pass constitutional muster,"[29] subject to the admonition that "[t]he validity of this assumption would depend upon, among other things, the availability of expeditious judicial review of the Commission's refusal of a permit."[30] The cryptic phrase "other things" almost certainly must refer to other procedural safeguards such as the right to an administrative hearing,[31] to the absence of additional criteria unrelated to competing public uses such as the content of the message and past conduct of the applicants,[32] or to the absence of a history of administrative abuse. The most plausible reading of *Shuttlesworth*, therefore, is that the competing public uses sufficient to justify refusal of a permit for a mass demonstration need be characterized in terms no more specific than "convenience" and quantified in terms no more precise than "undue disturbance."

In practical terms, the combined import of *Cox* and *Shuttlesworth* is to give the ultimate decision-maker virtually unfettered discretion in deciding the issue of resource allocation. This approach does not necessarily run afoul of the strong principle against unlimited administrative discretion when free speech is involved,[33] for the ultimate decision-maker can be the local court, an appellate court, or even the United States Supreme Court, depending on the correlative constitutional doctrines concerning expeditious judicial review[34] and self-help.[35] Although it can be argued that in this politically charged area discretionary power that could never be entrusted to city officials may properly be given to the courts, the dangers inherent in judicial discretion—potential for abuse, diminished constitutional legitimacy[36]—make principled, doctrinal judicial review a preferable

28. The primary reasons that the Court refused to recognize this gloss were because it came too late—after the events that gave rise to the prosecution, the trial, and the charge to the jury—and because the Birmingham officialdom—in the person of Bull Connor—had acted upon a quite different reading of the statute. On this problem of judicial rewriting of overbroad statutes see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 891-901 (1970); Comment, *Judicial Rewritings of Overbroad Statutes: Protecting the Freedom of Association from Scales to Robel*, 57 CALIF. L. REV. 240 (1969).

29. 394 U.S. at 155.

30. 394 U.S. at 155 n.4.

31. *See* text accompanying notes 273-82 *infra*.

32. *See* pt. II. B. *infra* (message) and pt. II. E. *infra* (past conduct).

33. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 557-58 (1965).

34. *See* text accompanying notes 252-62 *infra*.

35. *See* pt. III. E. *infra*.

36. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); C. BLACK, JR., THE PEOPLE AND THE COURT (1960); Dworkin, *Does Law Have a Function? A Comment on the Two-Level Theory of Decision*, 74 YALE L.J. 640 (1965).

solution. Certainly the variables are too numerous and the judgments are too subtle to make feasible—at any level of decision-making—any kind of "definitional" or "per se" methodology. It is possible, however, that legal methods intermediate in the spectrum between absolute discretion and per se rules—balancing a finite number of previously legitimated factors; enforcement of an equal protection standard; and evaluation of reasonable alternatives—can provide a better means of dealing with the problem than the Court's present essentially discretionary approach.

1. *Controlled Balancing*

While discretionary decision-making calls for a balancing of all relevant considerations, "balancing" as a methodological term of art refers to a more controlled, artificial, inflexible, fragmented, less easily abused process whereby the decision concerning which factors will be cognizable and how they shall be weighted is made beforehand, without reference to a specific factual dispute.[37] For example,

37. All legal reasoning is "balancing" in the sense that value conflicts can be intelligently resolved only by adding up the pros and the cons of the competing positions. The important methodological question concerns the level of generality at which the value resolution should take place. Thus, an absolutist can argue that "on balance," considering not only the value of speech and the conflicting governmental interest in regulation, but also such factors as judicial economy and legitimacy, it is best never to allow punishment for "speech" but to pose few constitutional barriers to punishment for "conduct." Even then, the absolutist must define "speech" and "conduct," which he may do, for example, by deciding that, "on balance," it is best always to consider black armbands "speech" and face-to-face epithets "conduct." Others may favor a lower level of generality. They may argue that the value of speech, the conflicting governmental interest, the adjudication cost, the enforcement feasibility, the chilling effect, and other elements vary so much that a value resolution at the abstract level of "speech" and "conduct" is too unresponsive to the underlying competing values to be desirable. They may suggest a different per se formula for each general area of speech controversy: for example, obscenity ("appeals to the prurient interest, patently offensive, utterly without redeeming social value"); libel ("with knowledge that it was false or with reckless disregard of whether it was false or not"); subversive membership ("knowing, active membership, with specific intent to forward unlawful goals"); advocacy ("directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). Still others may suggest that even these specially tailored tests are too abstract and unresponsive, and that a better approach is to weigh and resolve the conflicting values in each case. At the lowest level of generality, this process calls for the decision-maker to engage in a pristine utilitarian calculus for each fact situation —in short, to exercise discretion. A level of generality somewhat higher than discretion but lower than the per se tests can be achieved by limiting the number of admissible variables on the ground that whatever would be gained in responsiveness to underlying values by considering other relevant variables would be lost in complexity, cost, time-consumption, and potential for abuse. Similarly, the admissible variables—at this point only general concepts—may be assigned static weights if it is thought that a case-by-case valuation process would be too complicated or too heavily influenced by personal factors. This latter methodology of limited variables and fixed weights is what is meant herein by the term "balancing." *See generally* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842 (1969).

using a balancing approach, a city official ruling on a permit request would not need to take evidence on every conceivable dislocation and annoyance and indirect economic effect of a demonstration, and then try to weigh them against his assessment of the particular speech value of the demonstration both to participants and to recipients of the message. Instead, pursuant to an appellate court ruling, he might assign a fixed speech value to all demonstrations and then consider on the other side of the balance only a limited number of quantifiable variables such as traffic flow, parking, access to buildings, and pedestrian passage. A significant advantage of such a controlled-balancing approach is economy, both in terms of the limited proof that must be marshalled and of the circumscribed analysis that must be undertaken by the decision-maker; and to the extent that expedited judicial review is deemed important,[38] economy should be a paramount consideration. Balancing also makes the initial decision more focused and articulated, and thus makes it more easily reviewable on appeal, an important consideration if hostility, myopia, or mediocrity are problems at the level of initial decision-making. Since the need for effective appellate review is especially great in the case of permit denials,[39] these advantages of economy and visibility would seem to outweigh the chief drawbacks of balancing—the rigidity and artificiality of the process.

But is it possible, within an acceptable range of artificiality, to reduce the factors involved in the terribly complex resource allocation decision to a few variables? And is it possible to develop a common unit of measurement for weighing the value of speech against the value of competing public uses? It would seem to be a fool's errand to attempt to calibrate ideas—or to assign a weight at any level of generality to the value of a given message. There *is*, however, a common denominator in the value conflict, and that is people. One man's personal satisfaction in demonstrating can be balanced against another man's inconvenience caused by the demonstration. In a constitutional system that has a strong commitment to the importance of speech, it can safely be said that one man's interest in speech is at least as important as another's substantial inconvenience and much more important than another's minor inconvenience.

This dichotomy between substantial and minor inconvenience can serve to limit the number of factors in the balancing process. The decision-maker can ignore those who suffer only minor incon-

38. *See* text accompanying notes 252-62 *infra.*

39. *See* text accompanying notes 252-72 *infra.*

venience (arguably as a trade-off for not counting the number of people who will be indirectly and perhaps involuntarily benefited by hearing the message), and then weigh the expected number of demonstrators against the number of people who will be substantially inconvenienced. Furthermore, substantial inconvenience can be reduced, again somewhat arbitrarily, to a finite number of forms: (1) serious delay in driving caused by a predictable traffic jam or lengthy detour; (2) loss of a parking place within three blocks of destination; (3) loss of access to one's destination; (4) lengthy (at least three blocks) pedestrian detour; (5) dramatic increase in the noise level in an area ordinarily distinctive for its quietude. Minor inconvenience could be considered in the balancing process in one exceptional circumstance: if the number of people likely to suffer minor physical inconvenience in the use of the public ways were grossly disproportionate to the number of demonstrators, then the speech could be prohibited. Thus, a solo zealot could be denied the right to commandeer even a minor intersection if several motorists would have to be slightly rerouted, and could even be denied the right to use a square or plaza should the number of loafers in search of serenity greatly exceed those in search of enlightenment.

Critics of this balancing formula might argue that it is untrue to the spirit of the first amendment to define free speech according to the size of the protesting faction, and also that there is no reliable way of predicting the size of a crowd or the number of people who will be substantially inconvenienced. It undoubtedly would be irrational to regulate the *content* of speech on the basis of numbers, since the worth of an idea is likely to bear little correlation to the number of persons who can be enlisted in its support. For the resource allocation aspect of speech regulation, however, the speech value at stake is not the survival of the idea but the personal satisfaction of physical participation, the sum total of which will bear at least a linear correlation to the size of the demonstration.[40]

Prediction and proof would be difficult under the balancing formula suggested above, but probably not so difficult as under the Supreme Court's present discretionary approach (assuming that discretion, to be defensible, must be exercised on the basis of information and analysis rather than prejudice, whim, or inertia). Under the suggested controlled-balancing approach, the applicants would have

40. Probably the correlation will be greater: the satisfaction that one person experiences from being part of a crowd of fifty is usually not as great as his satisfaction in being part of a crowd of several thousand; with each increment to the group there will be more people, each enjoying the event more.

to bear the burden of proving their numerical claims. Relevant evidence would include membership strength, past participation in similar demonstrations, predictions of crowd size by reporters and police officers, and, most persuasively, affidavits of intent to participate. The city would have the burden of proof on the issue of substantial inconvenience. In most cases, traffic flow data would already be on hand; in addition, specific traffic, pedestrian, and parking surveys could be taken without much trouble or expense. Estimates of inconvenience made by city officials in granting permits to groups who express more "acceptable" ideas would be highly relevant.

A final reason for preferring the controlled-balancing approach is that it is an ideal methodology for introducing into the decision-making process a most significant and too frequently overlooked variable: duration. A one-hour interruption of the normal routine can have a certain festive air; it can give the demonstrators their physical outlet, their showing of numerical strength, their discovery of unity, or their thirty seconds of television exposure. A longer event can wear down the patience of police and onlookers, can give hecklers time to round up support, and can lead to disruptive acts by protestors attempting to reverse a sagging momentum. Numerical balancing would be uniquely sensitive to the duration factor because the number of expected demonstrators would remain constant while the number of people seriously inconvenienced would vary directly with the proposed length of the demonstration—a two-hour demonstration might be protected whereas a four-hour assemblage of identical size and character might not.

2. *Equal Protection*

Controlled balancing would also greatly facilitate enforcement of an equal protection standard,[41] since under the balancing approach manageable comparisons between different demonstrations could be made for the first time. Presently, rejected applicants find it very difficult to make a persuasive equal protection claim unless a comparable group has previously been granted a permit for the same type of demonstration over the same route for the same duration at the same time of the day and week. The numbers game of controlled balancing would provide a common currency for a much broader range of comparisons.

41. If an equal protection standard were desirable it could be rooted in either the general command of the fourteenth amendment or in the embryonic concept of "first amendment equal protection" suggested in Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

But before stampeding on to the administrative details, it is necessary to consider whether the equal protection principle should be applicable at all to the resource allocation decision. If unpopular groups are protected to the extent of the controlled balance, should not the municipality have the option of giving some groups a larger share of public resources than is constitutionally required without thereby binding itself to similar allocations for other groups at other times? In this regard, the equal protection principle may actually conflict with the free speech interest, since a rigid most-favored-group guaranty might result only in fewer and smaller parades by the Shriners, the Little League, and the American Legion—a net loss to the community in terms of expression and the satisfaction of personal participation.

There are few precedents on this touchy dilemma, primarily because the requisite equal protection comparison is difficult to make in the absence of an artificial measuring system such as the controlled balance. It is settled that a municipality cannot declare an area absolutely off limits to one group and then allow other more popular groups to speak there;[42] but such a situation is a separate problem since the all-or-nothing aspect makes the classification according to ideology especially debilitating, the claimed regulatory need especially unpersuasive, and the inequality especially visible. Governments can no longer distribute benefits like teaching positions,[43] civil service jobs,[44] and tax exemptions[45] on the basis of ideological affinity, but a major reason for that doctrine is the empirical assumption that such a distribution scheme would have an over-all inhibiting effect on expression.[46] This may be a doubtful assumption

42. *See* Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemetko v. Maryland, 340 U.S. 268, 272-73 (1951). *See also* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 510 (1969); Cox v. Louisiana, 379 U.S. 536, 557 (1965); Davis v. Massachusetts, 167 U.S. 43, 47 (1897); Wolin v. Port of New York Authority, 392 F.2d 83, 90 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968); Resistance v. Commissioners of Fairmount Park, 298 F. Supp. 961 (E.D. Pa. 1969); Hughes v. Rizzo, 282 F. Supp. 881, 885 (E.D. Pa. 1968) (attempt to ban "hippies" from a public square: "the law may not suppress one class of idlers in order to make a place more attractive for other idlers of a more desirable class"); Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946); Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962).

43. *See, e.g.*, Elfbrandt v. Russell, 384 U.S. 11 (1966). *See generally* Israel, *Elfbrandt v. Russell: The Demise of the Oath?*, 1966 SUP. CT. REV. 193.

44. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967).

45. Speiser v. Randall, 357 U.S. 513 (1958).

46. *See* Israel, note 43 *supra*; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *The Chilling Effect of the Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

when applied to demonstrations, both because a demonstrator is not likely to be deterred from expressing himself by the fear of losing incremental (over and above the controlled-balance) privileges and also because of the possibility, mentioned above,[47] that a strict equal protection rule would be counter-productive in terms of the sum total of demonstrating.

General fourteenth amendment principles may provide some direction in determining whether and to what extent equal protection principles should be applied to demonstrations.[48] The courts tend to exercise more "active" scrutiny over classifications when the interests at stake are deemed "fundamental"[49] or when the classifying criteria undercut values that are recognized by other constitutional provisions.[50] Also, active scrutiny would seem to be more warranted when the classification is the work of nonelective officials[51] and when such scrutiny would not bring on a caseload inconsistent with an intelligent allocation of scarce judicial resources.[52] Active review is not, however, to be equated with unconstitutionality; rather it is a judicial insistence that the importance of the objective sought to be achieved by the classification be apparent and that alternative, less drastic measures for achieving that objective be employed if at all possible.

In applying this analysis to the problem of permit administration, it would be straining somewhat to call the interest in incremental demonstrating "fundamental."[53] While a classification according to

47. *See* text preceding note 42 *supra.*

48. *See generally Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

49. *See* Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956) (right of the criminally accused to a proper defense).

50. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Brown v. Board of Educ., 347 U.S. 483 (1954) (racial discrimination).

51. When a court reviews a classification made by nonelective officials, the (largely specious) arguments about deference to legislative judgment, effective remedies at the ballot box, and the need to allow flexibility for legislative compromising and logrolling, have no applicability.

52. This may explain the Supreme Court's seeming reluctance to do anything about the gross inequality inherent in most educational financing schemes. *See* McInnis v. Ogilvie, 394 U.S. 322 (1969); J. COONS, W. CLUNE & W. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970).

53. This is not to disparage the importance of demonstrating nor to imply that the interest in demonstrating that goes into the controlled balance is not entitled to great weight. The point is simply that the interest in getting more than the controlled balance would allocate cannot compare to the interests at stake in the voting and criminal defense cases. Language in Williams v. Rhodes, 393 U.S. 23 (1968), suggests that all

ideology would certainly seem to undercut first amendment values, a classification according to a reasonable apprehension of violence might not. The fact that the permit decision is usually made by non-elective officials would seem to favor active review of the decision. While a strict equal protection standard would not lead to the initiation of many new cases, it would, nevertheless, severely complicate existing litigation. Factual disputes would rage, not only over the immediate planned event, but also over the proper estimates for past uncontested demonstrations. This problem of proof could be minimized by accepting the city's recorded estimates of participation and inconvenience for all permits voluntarily granted, but such a doctrine might require the city to keep records against its will and in any event would probably only result in inflated estimates of expected Legionnaires and correspondingly deflated estimates of the inconvenience created by their parades.

There would be other complicating factors in using the equal protection analysis. If 100 Little Leaguers were allowed seriously to inconvenience 200 people, would that necessarily compel the conclusion that 500 Weathermen must be allowed to inconvenience 1,000 people? Shouldn't happy New Yorkers lining the parade route to watch the Mets or the astronauts be counted as participants rather than spectators? If so, should apathetic New Yorkers watching Hubert Humphrey or disgruntled New Yorkers watching the Vietnam Moratorium be accounted for in a similar fashion? Moreover, suppose that the city decides that the last Shriners' parade was too bothersome and that it wants to reverse its resource-allocation policy? These problems are not insoluble, but they do introduce into the analysis an element of complexity that ought to weigh in the basic decision whether equal protection should be applicable at all, and if so, to what extent.

The conclusion seems warranted that, in light of the problems outlined above, any equal protection scrutiny should be of the passive, "roll-over-and-play-dead" variety currently employed in testing economic regulations.[54] The applicants' interest in obtaining a re-

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first amendment interests will be deemed "fundamental" for purposes of triggering active equal protection scrutiny. It appears, however, that "fundamentality" is to be determined not by looking to the general subject matter but rather to the incremental interest asserted, for in McDonald v. Board of Election Commrs., 394 U.S. 802 (1969), the Court exercised only passive scrutiny after explaining that although the subject matter was voting, the incremental interest at stake was "merely" that of obtaining an absentee ballot. In addition, the fundamentality concept was recently dealt a stultifying blow when the Court refused to consider the interest in receiving welfare allotments sufficient to trigger active equal protection review. Dandridge v. Williams, 397 U.S. 471 (1970).

54. *See* cases cited in notes 57-59 *infra.*

source allocation more favorable than that required by controlled balancing cannot be placed on a par with voting or receiving an effective criminal defense, and the complexities of adjudication involved with a more strict standard would forbid the use of such a standard.

Unequal treatment openly based on ideology may have a ring quite discordant with that of the first amendment, but even for such a blatant classification the argument for a more active scrutiny similar to that accorded racial classifications is less than compelling. Ideological classifications, unlike classifications based on race, sex, and legitimacy, are not dependent upon an immutable trait beyond the control of the persons affected by the discrimination. While stigmatization of minority races can serve no legitimate governmental purpose, stigmatization of minority viewpoints, even to the extent of vice-presidential epithets, is unavoidable if the government is to have its day in a robust market place of ideas. Classification according to race, at least when it disfavors the minority race, violates what may be termed a moral taboo; classification according to ideology, however, is considered perfectly acceptable in many contexts—handing out postmasterships, inviting banquet speakers, restoring "balance" to an economics faculty or a supreme court.

The thrust of this argument should not be misconstrued: the only point is that classification according to ideology should not be enough *by itself* to trigger active equal protection review. When the interests at stake are fundamental, the review should be active. When the task is to define the minimum amount of constitutionally protected expression, rather than to assess the significance of the city's granting an expression surplus to some groups, the review should be active. Similarly, the review should be active when the ideological classification will have an over-all "chilling effect" on expression. But as detailed above,[55] none of these factors is present when the issue is framed in terms of resource allocation beyond that required by controlled balancing.

Even under "passive" equal protection scrutiny, however, a classification must relate in a plausible way to some legitimate governmental purpose.[56] The prevention of violence would certainly qualify as such a purpose, and under passive review the courts would be loath to second-guess the city's empirical conclusion that a demonstration by one group presented a greater potential for violence than did a demonstration by another. Realistically, passive equal protection

55. *See* text accompanying notes 42-47 *supra*.

56. Levy v. Louisiana, 391 U.S. 68, 71-72 (1968).

review would be the functional equivalent of no equal protection scrutiny at all, as a number of would-be barmaids,[57] river pilots,[58] and opticians[59] have found out.

The conclusion that the equal protection principle should not limit the resource allocation decision has two important drawbacks. First, with an effective equal protection requirement, municipalities would be forced to make either honest or biased-toward-expression estimates for popular demonstrations, and those estimates could in turn serve as a credibility check against distorted estimates for unpopular groups. With the passive equal protection standard, however, this check would be sacrificed. Second, legitimating ideological discrimination in granting permits beyond those required to be granted by the controlled-balancing formula may very well have a spill-over effect, making bureaucrats more disposed to practice such discrimination in calculating the balance. When all is considered, however, these consequences are outweighed by the other more positive factors discussed above,[60] and especially by the paramount value of minimizing the complexity of adjudication in order to facilitate expeditious decision-making at the highest possible level.

3. *Reasonable Alternatives*

The New Hampshire statute upheld by the Supreme Court in *Cox*, as construed by the New Hampshire supreme court, permitted "such conditions or changes in time, place, and manner as would avoid disturbance,"[61] and the drastically narrowed ordinance whose constitutionality was assumed in *Shuttlesworth* gave officials the power of "prescribing the streets or other public ways which may be used therefor."[62] In neither case did the Supreme Court call attention to the problems raised by such provisions, but the fact remains that the over-all schemes were approved. Thus, *Cox* and *Shuttlesworth* must stand as at least sub silentio declarations that alternative sites and times are permissible factors to be considered by officials in ruling upon permit requests. If this is in fact the rule for mass assemblies, it contrasts dramatically with the prevailing doctrine for handbills: "[O]ne is not to have the exercise of his liberty of ex-

57. Goesart v. Cleary, 335 U.S. 464 (1948).

58. Kotch v. Board of River Port Pilot Commrs., 330 U.S. 552 (1947).

59. Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

60. *See* text accompanying notes 42-55 *supra*.

61. State v. Cox, 91 N.H. 137, 146, 16 A.2d 508, 515 (1940), quoted at 312 U.S. at 576.

62. BIRMINGHAM, ALA., CODE § 1159 (1944), quoted at 394 U.S. at 149.

pression in appropriate places abridged on the plea that it may be exercised in some other place . . . ."[63]

A reasonable-alternative approach appears to have several advantages. In terms of the controlled-balancing formula, there is nothing magical about a narrow outweighing of one side by the other; the goal should be to maximize the satisfaction of personal participation and at the same time to minimize the inconvenience to nonparticipants. Moving a demonstration to a different time or place may accomplish these objectives. Moreover, while it may be necessary for reasons of economy of adjudication to treat all serious inconveniences as of the same magnitude,[64] the fact is that they will not be. Thus, it makes sense to allow the city—the party which can best judge the degree of inconvenience—to dictate the details of the proposed demonstration in order to minimize the magnitude as well as the number of serious inconveniences. An additional dimension of the reasonable-alternative analysis is the planned distribution of inconvenience. While it may not be unfair to force a particular group of merchants and commuters to bear the brunt of the inconvenience caused by one demonstration, a city cannot be blamed for attempting to shift the burden of inconvenience for the next demonstration to a different group by changing the time and/or the place of the proposed demonstration. For a host of reasons which will be discussed below, the fear of a hostile audience or the possibility (unsubstantiated by proof of specific intent or an immediate background of violence) that the demonstrators will cause violence should never be reasons for refusing permits or enjoining assemblies.[65] Consequently, it is all the more important for a city to minimize the danger of violence by rerouting the demonstrators away from hecklers and especially volatile or vulnerable areas within the city. Likewise, if applicants cannot be forced to pay in advance the cost of policing their event, as suggested below,[66] the city has a special financial interest in the details of the demonstration, since the number of police required may vary considerably depending upon the time and place of the demonstration. In response to the cynical observation that inconvenience, danger, and cost can always be minimized by putting the demonstrators out in a cow pasture, a principle could be applied whereby the alternative site and/or time must be, in the opinion of

63. Schneider v. Town of Irvington, 308 U.S. 147, 163 (1939).

64. *See* text preceding note 40 *supra*.

65. *See* pt. II. D. *infra* (fear of a hostile audience); pt. II. C. *infra* (specific intent); pt. II. E. *infra* (past conduct of the applicant); and pt. II. F. *infra* (immediate background of violence).

66. *See* text accompanying notes 176-84 *infra*.

the ultimate decision-maker, just as desirable as the applicants' first choice.

There are, on the other hand, two major problems with a reasonable-alternative approach. First, it is impossible to measure the desirability of a particular time and place by any standard other than the demonstrators' own subjective values. Can a bureaucrat or a judge tell the applicants that a particular site really is not all that symbolic or is not the true locus of their grievance? A related difficulty is that it smacks of paternalism to have the government dictating the details of a protest. Certainly a legitimate and important value to be considered in determining the desirability of a reasonable-alternative approach is the individual satisfaction derived, not just from participation and expression, but from personal, creative, and unprogrammed participation and expression. Demonstrators, of course, have social obligations, but when the calculus embodied in the controlled-balancing formula awards them the use of public resources, they may justifiably chafe at having to make further sacrifices in the name of the public interest, especially if the utilitarian fairness of the controlled balance is at the same time used as a reason for not employing a meaningful equal protection standard in deciding the resource allocation question.[67]

The second major problem with a reasonable-alternative approach is the omnipresent one of complexity and cost of adjudication. The magnitude of this problem, however, can be overestimated. A reasonable-alternative analysis would not complicate litigation nearly so much as would an active equal protection analysis since, under the former, the inquiry would be limited to a few alternative sites and times proposed by the city, and the only question would be whether any of those sites and times was as desirable as the applicants' first choice. On the other hand, a determination of the relative desirability of a number of sites and times could be a substantial task. The variables are many: symbolic importance, comfort, likelihood of attracting media coverage, size and character of the probable group of bystanders, transportation and parking facilities for the assembling demonstrators, time convenience of the demonstrators in light of work, school, and child care commitments. The weighing process could be simplified somewhat by making conclusive the city's judgment that the alternative sites and times would be preferable in terms of the variables of public inconvenience, danger, and cost, but in that event the demonstrators might fairly ask why their judgment

67. *See* text accompanying notes 42-60 *supra.*

concerning desirability should not likewise be conclusive for the variables that concern them.

A final factor in the equation is the degree to which the advantages of the reasonable-alternative approach can be realized without burdening the adjudication process with the complexities inherent in such an approach. Municipalities could be required never to reject applications outright, and always to offer alternative sites and times,[68] except, of course, if it could be shown that the demonstrators had a specific intent to cause violence.[69] There would be a number of incentives for applicants to accept the proffered alternatives. Against the incremental desirability of demonstrating at the time and place of their first choice, demonstrators would weigh the delay, energy, cost, and risk of defeat involved in forcing the city into court—discounted by any harassment and cause célèbre advantages that litigation might offer.

Although the factors weigh heavily on each side, and the question is an extremely close one, it appears that the first amendment controlled-balancing determination should not be affected by the presence or absence of alternative sites and times. Again, the decisive factor is complexity of adjudication. If expedited judicial review is to function effectively, it cannot be stressed enough how important it is to keep the evidence manageable and the inquiry focused.

The factor of complexity of adjudication works to the disadvantage of the applicants in one respect. While the decision-maker, at each level, should be required to sweeten a rejection with an offer of a reasonable alternative, the applicants should not be entitled to institute new proceedings to test the optimality of the alternative offering. They should be entitled to a ruling on precisely the event they wish to stage; if they play their hand too boldly they should have to settle, no questions asked, for the safe alternative offered by the

68. For example, a New York City Department of Parks regulation provides: "Whenever a permit is denied by reason of (b), (c) or (d) above [location or time not suitable], alternative suitable locations and dates shall be offered to the applicant." *See* Rockwell v. Morris, 12 App. Div. 2d 272, 286, 211 N.Y.S.2d 25, 41 (1961). In Yenofsky v. Silk, 305 F. Supp. 991 (D. Mass. 1969), the court listed as one of its reasons for granting the applicants' prayer the fact that the city had failed to offer an alternative route.

69. Even a background of violence would not relieve the city from the obligation to offer an alternative. *See* pt. II. F. *infra*. If such a background were shown by proof of immediate past violence (*see* text accompanying notes 155-56 *infra*), the city could offer an alternative site where there had been no violence. If the background were proven by the imposition of a general curfew (*see* text accompanying note 157 *infra*), the city could offer a site outside the curfew area or, if the curfew were city-wide, an alternative time when the curfew would not be in effect; if necessary, a time as indefinite as "the first day after the curfew is lifted" could be offered to the applicants.

decision-maker—while retaining, of course, the right to appeal to a higher tribunal the rejection of their first choice. Not only would this procedure limit adjudication costs, it would also give the applicants an incentive to bargain with the city over alternative times and routes, since they might arrive at a more desirable alternative through negotiation with the city than would be offered them by the ultimate decision-maker as a consolation prize after he rejected their initial proposal.

4. *Per Se Restrictions on Place, Time, Size, and Duration*

In certain situations, the use of per se rules may provide a workable approach for dealing with the problems presented by demonstration permit cases. In view of the undoubted importance of minimizing adjudication time and costs and of limiting the opportunity for administrative abuse, per se restrictions should be favored whenever feasible. For most demonstration permit disputes, however, the number of critical variables is so great that per se restrictions are simply too artificial and too unresponsive to the underlying competing interests. Thus, controlled balancing usually—although not always—represents a better accommodation between realism and economy. In certain instances, however, per se restrictions regarding place (for example, never on an expressway), time (never between 4:00 p.m. and 7:00 p.m., Monday through Friday), duration (never longer than three hours) and size (never more than 1,000 marchers) may produce results not markedly different from the controlled balance; and these results could be achieved at a substantial savings in terms of the energy, time, and money devoted to making the decision.

The basic question is how much deviation from the controlled-balancing results should be tolerated in the name of economy. If the deviation were neutral, in the sense that it adversely affected the regulatory interest approximately as often as the speech interest, the inquiry would be reduced to weighing the artificiality of the process (neutral but nonetheless undesirable) against the adjudication savings. This neutrality would be possible if the regulatory scheme consisted entirely of per se restrictions—for example, no demonstrations on Sundays, on weekdays between 4:00 p.m. and 7:00 p.m., and on Main Street, all other requests granted regardless of how much inconvenience would be caused thereby—but then only if the per se restrictions were such that the number of applications "improperly" (in terms of the controlled balance) granted roughly equalled the number of applications "improperly" denied. In practice, however, per se restrictions would always complement rather

than replace the balancing calculus; either would be a sufficient predicate for refusing to issue a permit since no municipality would be likely to gamble on the adequacy of a totally per se scheme. Thus, the deviation from the controlled-balancing results would always favor the regulatory interest.

With the burden, in terms of deviation from the controlled-balancing results, falling entirely on the speech interest, per se restrictions should be upheld only if that burden is kept to a relatively low level—that is, only if for a very high percentage of the anticipated (not hypothetical) requests governed by the per se restriction the controlled-balancing measure would likewise require rejection.[70] Probably, only per se restrictions combining the factors of place and time-of-day (never on Main Street between 4:00 p.m. and 7:00 p.m. on weekdays) would be able to pass this test. On the other hand, cities could still declare certain publicly owned properties to be "functionally private" and thus not open to the general public;[71] the above limitation would cover only per se restrictions with respect to demonstrations in "functionally public" places.[72]

Per se restrictions should also be limited by an active equal protection standard. The reasons for not insisting on equal protection with respect to the balancing calculus[73] are not present in the case of per se restrictions. Adjudication would not be complicated: did the city let the Shriners use Main Street or didn't it? Moreover, the uncertainty of how to regard the happily inconvenienced onlookers at a popular parade would not complicate the determination of unequal treatment. Furthermore, the issue is not wide-open as a matter

70. Prophylactic regulations of speech are highly suspect. *See* Shelton v. Tucker, 364 U.S. 479 (1960). In Wollam v. City of Palm Springs, 59 Cal. 2d 276, 286, 379 P.2d 481, 487, 29 Cal. Rptr. 1, 7 (1963), the California supreme court found an ordinance which prohibited all sound trucks moving at less than 10 m.p.h. to be in violation of the first amendment. The court stated: "Its [the ordinance's] reach is not limited to the prohibition of a sound truck which impedes the flow of pedestrian and vehicular traffic or which creates a dangerous traffic situation. Rather it sets up a blanket prohibition against the use of a stationary sound truck. The provision fails because, assuming its valid police purpose, it proceeds beyond that which is necessary." *See also* Davis v. Francois, 395 F.2d 730 (5th Cir. 1968). *But see* Commonwealth v. Guess, 168 Pa. Super. 22, 76 A.2d 500 (1950).

71. *See* Adderley v. Florida, 385 U.S. 39 (1966) (a jailyard).

72. *See* Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (privately owned shopping center held to be "functionally public"); *In re* Lane, 71 Cal. 2d 775, 457 P.2d 561, 79 Cal. Rptr. 729 (1969); Schwartz-Torrance Inv. Corp. v. Baker & Confectionery Workers Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964). *See also* Wolin v. Port of New York Authority, 268 F. Supp. 855, 860 (S.D.N.Y.), *aff'd.*, 392 F.2d 83, 88 (2d Cir. 1967), *cert. denied*, 393 U.S. 940 (1968); Farmer v. Moses, 232 F. Supp. 154 (S.D.N.Y. 1964); *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

73. *See* text accompanying notes 42-55 *supra*.

of precedent, since several cases have already applied an active equal protection standard to per se restrictions.[74]

In summary, it is beyond dispute that some competing public uses justify permit denials for and injunctions against demonstrations. The doctrinal debate is over how those uses must be characterized, measured, proved, and weighted. Thus far, the courts have failed to fashion any meaningful standards to deal with these problems; the prevailing shibboleth—"undue disturbance of public convenience"—amounts to no more than a grant of discretionary authority to the ultimate decision-maker.

The first amendment should be interpreted to mean that a demonstration must be allowed whenever the probable number of demonstrators exceeds the number of citizens who would be seriously inconvenienced by the march or rally. Minor inconvenience caused by the demonstration should not be considered unless the number of minor inconveniences is grossly disproportionate to the number of protestors, in which case the event could be prohibited. Should municipalities choose to allow some gatherings that would not qualify under this numerical balancing formula, there should be no constitutional requirement that less popular groups be given equal treatment. By the same token, demonstrations which qualify for approval under the numerical balancing standard should not be denied such approval on the ground that an alternative site or time would be less inconvenient. Finally, per se restrictions regarding place, size, and duration should pass constitutional muster only if, for a very high percentage of the anticipated requests denied because of the per se rule, the numerical balancing formula would likewise support rejection.

B. *The Message of the Demonstration*

It is easy enough to proclaim that "censorship" must not be practiced—that the demonstrators' ideas can never be factors in refusing a permit or granting an injunction. But what if the message of the demonstration is obscene, libelous (even after *New York Times Company v. Sullivan*[75]), an invasion of privacy, or consists of "fighting words"?[76] What if the message is commercial and thus not entitled to the full panoply of first amendment protection?[77] What

74. *See* cases cited in note 42 *supra*.

75. 376 U.S. 254 (1964).

76. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

77. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).

if the demonstrators' message is a relevant factor for predicting the size and behavior of the crowd or the likelihood of hecklers?[78]

The general problem area of prior content regulation of speech is, to a large extent, a doctrinal wasteland. In *Near v. Minnesota*[79] the Supreme Court struck down an injunction against "malicious, scandalous, and defamatory"[80] publications and waxed eloquent on the general evils of prior restraints; but the opinion also emphasized that the particular scheme at issue placed the burden on the publisher to establish both truth and good motive. Moreover, in acknowledging that the constitutional ban on prior restraints is not absolute, the Court proffered a far-reaching dictum:

> No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.[81]

Thirty years later, in *Times Film Corporation v. City of Chicago*,[82] the Court cited this dictum in refusing to fashion a constitutional principle that would completely prohibit content regulation of films at the prior-restraint stage, although the opinion noted that motion pictures were not "necessarily subject to the precise rules governing any other particular method of expression."[83] The Supreme Court has never spoken to the precise problem of prior regulation of demonstrations based on the proposed message of the demonstrators. The lower courts appear to be divided in this area,[84] and no lower court opinion has contributed a very helpful analysis.

From the standpoint of efficiency, it makes sense for a city to regulate the content of a demonstration before the event. The dam-

78. *See* City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d (1961).

79. 283 U.S. 697 (1931).

80. 283 U.S. at 706.

81. 283 U.S. at 716.

82. 365 U.S. 43 (1961).

83. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952), quoted at 365 U.S. at 49.

84. *Compare* Smith v. University of Tenn., 300 F. Supp. 777 (E.D. Tenn. 1969); Resistance v. Commissioners of Fairmount Park, 298 F. Supp. 961, 963 (E.D. Pa. 1969); Snyder v. Board of Trustees of Univ. of Ill., 286 F. Supp. 927, 936 (N.D. Ill. 1968); Rockwell v. Morris, 12 App. Div. 2d 272, 282-83, 211 N.Y.S.2d 25, 36 (1961); *with* Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969); Stacy v. Williams, 306 F. Supp. 963, 973 (N.D. Miss. 1969); East Meadow Community Concerts Assn. v. Board of Educ., 18 N.Y.2d 129, 272 N.Y.S.2d 341, 219 N.E.2d 172 (1966).

age done by libelous, privacy-invading, or violence-inciting speech is often irreparable; preventing the speech from ever working its harm is better both for the putative victims and for the speakers, who are faced only with permit denials and injunctions rather than criminal convictions. A prior-restraint mechanism is also the most efficient means of informing demonstrators who wish to stay within the bounds of protected expression exactly where that elusive line is. A prior seal of approval may also help the demonstrators to recruit pillar-of-the-community types to give their event more political selling power. In addition, permit and injunction decisions may already be influenced by expectations regarding content, so that formal submission of the planned speeches and signs would be an improvement over a system of uninformed and paranoic guesswork by city officials and judges. With expedited judicial review of permit denials, as advocated below,[85] the primary danger of prior restraints—the fact that professional censors are likely to reach results quite different from those which judges would reach—can be significantly reduced; moreover, this danger is not present at all when the prior restraint takes the form of an injunction. Thus, if the various burdens of initiation, going forward, and proof are placed on the government, again as advocated below,[86] the argument against prior content regulation of demonstrations must rely essentially on the impracticalities of enforcement.

Prior submission of the content of a film is easy; all that is necessary is to schedule an advance showing for the censors. Speeches, on the other hand, tend to be written the night before or, more frequently, improvised on the spot from scribbled outlines. Placards and banners usually are produced in an uncoordinated, do-it-yourself fashion. Generalized descriptions of content (for example, "to protest the war") seldom provide enough information to support findings of unlawful advocacy, libel, invasion of privacy, or obscenity, although in certain cases they may: for example, "will read the names of war dead";[87] "will read from the private correspondence of Grayson Kirk";[88] "will culminate with a massive draft-card turn-in";[89] "will present a nude couple making love."[90] General statements of

85. *See* text accompanying notes 252-62 *infra.*

86. *See* text accompanying notes 249-51 *infra* (initiation); and text accompanying notes 226-35 *infra* (going forward and proof).

87. Arguably, this would be an invasion of privacy.

88. *Id.*

89. *But see* Resistance v. Commissioners of Fairmount Park, 298 F. Supp. 961, 963 (E.D. Pa. 1969).

90. Such action clearly would be a violation of most municipal obscenity statutes.

content are also usually adequate to identify purely commercial exhibitions. But for the most part, any consideration of content at the permit application stage could easily be thwarted by applicants careful enough to keep their demonstrations unstructured, disorganized, or spontaneous. Any attempt to coerce specificity by means of an obligation of full disclosure and a continuing duty to report plans as they progress would most likely be unenforceable, and would surely be a considerable annoyance both to city bureaucrats and to protestors.

Thus, rather than injecting these difficult content issues into the permit application process and thereby putting a premium on vague and evasive applications, a preferable approach would be to develop a general constitutional ban on prohibiting a demonstration because of the proposed message, subject to two caveats: (1) the proposed message, though not the demonstration, could be enjoined; and (2) a proposed commercial message could support the refusal of a permit.

The injunction-against-content alternative would have a number of virtues: the initial decision would always be made by a judge; the permit decision based on the permissible criteria would be separated from and not delayed by reversals and remands concerning the content factor; and the individuals who transgressed the bounds of protected speech could be punished for contempt without jeopardizing the rights of those who wished to engage in lawful assembly and expression. While there are maxims to the effect that "equity will not enjoin a crime"[91] and "equity will not enjoin defamation,"[92] these doctrines are riddled with exceptions,[93] are of dubious wisdom in the first place,[94] and, in any event, are surmountable by legislation or judicial decree.

On the other hand, although allowing the assembly and prohibiting parts of the message might or might not increase the likelihood of defiance of the restrictions by the demonstrators, such a procedure would certainly increase the danger of *harmful* defiance: a crowd, composed in part of those who would not have come had the whole assembly been prohibited, would be on hand to be incited to riot or to resist the draft, or to hear the forbidden defamation, obscenity,

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E.g., DETROIT, MICH., CITY CODE § 39-1-26 (Supp. 1969); CHICAGO, ILL., MUNICIPAL CODE § 192-7 (1963).

91. *See Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1013-19 (1965).

92. *Id.* at 1008-12.

93. *Id.* at 1013-16.

94. *Id.* at 1016-18.

or invasion of privacy. Also, it can be argued that a nation whose heritage includes the *Debs* case[95] and the other judicial outrages that led to the enactment of the Norris-LaGuardia Act[96] should be somewhat wary about encouraging the injunction as a method of regulating the conduct of unpopular groups, especially since there is seldom time for appellate review of the constitutionality of an injunction, and since disobedience of a court order is punished in many instances without the right to a jury trial.[97] On the other hand, when regulation speaks only to content, the facts will seldom be in dispute, so that the jury's role would be minimal in any event. Furthermore, adequate appellate review would be possible if, as advocated below,[98] protestors who made every reasonable effort to vacate an injunction could disobey it without losing the right to challenge its constitutionality in defense to contempt citations.

On balance, the advantages of the injunction-against-content method of regulation seem to outweigh the drawbacks. Except in the case of commercial demonstrations, the proposed message of a demonstration should be individually enjoinable but should never be a factor in denying permit requests or in prohibiting entire assemblies by injunction.

The commercial exception is desirable both in terms of first amendment theory and enforceability. Whether one considers the relevant model for free speech analysis to be the intent of the Founding Fathers, the rational dialectic, access to the media, democratic participation, or release of the id, speech motivated by and tailored to the desire to sell a product would seem to fall outside the ambit of concern. The line is not always easy to draw, but the Supreme Court has wrestled with some of the close cases: it has held, for example, that political advertising,[99] soliciting for nonprofit causes,[100] bookselling,[101] and film exhibition[102] are entitled to full first amendment analysis, but that advertising of nonartistic products[103] and soliciting for profit[104] are not. Moreover, the difficulties with speci-

95. *In re* Debs, 158 U.S. 564 (1895).

96. 29 U.S.C. §§ 101-15 (1964). *See generally* F. FRANKFURTER & N. GREEN, THE LABOR INJUNCTION (1930).

97. *See* Frank v. United States, 395 U.S. 147 (1969).

98. *See* text accompanying notes 331-49 *infra*.

99. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

100. Martin v. Struthers, 319 U.S. 141 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

101. Smith v. California, 361 U.S. 147 (1959).

102. Freedman v. Maryland, 380 U.S. 51 (1965).

103. Valentine v. Chrestensen, 316 U.S. 52 (1942).

104. Breard v. City of Alexandria, 341 U.S. 622 (1951).

ficity, spontaneity, and caprice that plague attempts to regulate content in advance would not seem to hinder the simple inquiry whether the message to be conveyed by the parade or assembly is, in whole or in part, for the purpose of advertising, promoting, or peddling a commercial product.

An important question concerning content remains: can a general statement of content be required of the applicants in order to aid the city in preparing for the event, even though the statement cannot be a factor in refusing a permit or obtaining an injunction against the entire demonstration? A vague, general statement of content can serve some useful functions.[105] It can alert the city that the assemblage will be so controversial as to require extra details of police, who may be specially trained to cope with the demonstrators' ideological or epithetical taunts. Such a general statement can also give the city a basis for deciding whether an injunction against content should be sought. Citizens who are not interested in or who are hostile to the message can be warned ahead of time to absent themselves from the area to avoid becoming part of a captive audience. All of these functions can be served equally well, however, by requiring a general statement of content *after* the permit is granted, when awareness of an unpopular message will not color more "objective" judgments relating to traffic disruption, pedestrian inconvenience, and the like. There may be some occasions when it is in the interest of a notorious group to let it be known before a permit or injunction ruling that a particular demonstration is designed to convey a relatively uncontroversial message,[106] but this disclosure can be achieved informally without the need for a blanket obligation to reveal the content of the message before the decision. The constitutional principle should be that, apart from the commercial exception, a permit can never be denied or an injunction issued simply because

105. No court has held unconstitutional a requirement that applicants for a demonstration permit state their purpose or topic, although in Robinson v. Coopwood, 292 F. Supp. 926, 932 (N.D. Miss. 1968), *affd. per curiam*, 415 F.2d 1377 (5th Cir. 1969), the court held that protestors cannot be compelled to disclose in advance the identity of their proposed speakers for a rally. Purpose and topic disclosure requirements have been approved, in dictum or sub silentio holding, in a number of cases. Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Resistance v. Commissioners of Fairmount Park, 298 F. Supp. 961, 963 (E.D. Pa. 1969); Stacy v. Williams, 306 F. Supp. 963, 973 (N.D. Miss. 1969); Brooks v. Auburn Univ., 296 F. Supp. 188, 195 (M.D. Ala. 1968), *affd.*, 412 F.2d 1171 (5th Cir. 1969); City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961). *See also* American Cancer Soc. v. Dayton, 160 Ohio St. 114, 114 N.E.2d 219 (1953), in which the court ordered the issuance of a solicitation license which city officials had sought to deny on the ground that the purpose of the solicitation was already being adequately served by previously approved solicitations by other groups.

106. For example, a demonstration by the Students for a Democratic Society (SDS) protesting pollution.

the protestors refuse to reveal the content of their demonstration, but that the permit can be revoked or the injunction granted should the protestors persist in their refusal after permission to hold the demonstration has been obtained.

C. *The Purpose of the Demonstration*

In most cases the purpose of a demonstration is inextricably entwined with its message. To the extent that this is true, the above proposals relating to disclosure of content apply as well to purpose. On the other hand, purpose and message are not always so closely related. It is no longer a rarity for permit applicants to specifically intend to engage in or to provoke violence regardless of their supposed "message." Whatever the moral justification for such a response to a government that is hardly sparing in the deliberate employment of violence against *its* political opponents, foreign and domestic, no rational system of law can afford to condone or facilitate violent behavior. Thus, if it can be proved that the effective leaders of a proposed demonstration have a specific intent to cause violence, whether directly, or indirectly by provoking the police, there should be no constitutional prohibition against either enjoining the assemblage or refusing to grant a permit to the demonstrators.

Legitimating the consideration of intent at the prior-restraint stage will in all likelihood lead to serious abuses by officials and judges; such a dangerous principle is advocated only because planned violence is so very harmful to innocent individuals and to society as a whole, and is so very prevalent in the contemporary political climate. It is clear that safeguards against such abuse should be carefully constructed. Only a *specific* intent to cause violence, directed to the specific demonstration and manifested by specific plans, should suffice for a permit refusal or an injunction;[107] a general intent extrapolated from rhetoric or previous exploits should not be enough. Concrete evidence should also be required. In most instances this evidence would be the testimony of informers willing to drop their cover and be cross-examined or else recordings from wiretaps and eavesdropping devices installed pursuant to fourth amendment probable cause standards; documented plans by the demonstrators to bring equipment such as helmets, baseball bats, and medics would

107. Specific intent is a concept that is as prevalent in first amendment analysis as it is lacking in refinement. Probably the best way to approach the concept is to compare the indictments dismissed in Yates v. United States, 354 U.S. 298 (1957), with those remanded for new trials. *See also* the Court's treatment of the evidence in Scales v. United States, 367 U.S. 203 (1961). Other helpful discussions may be found in United States v. Spock, 416 F.2d 165, 176-79 (1st Cir. 1969); Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 128-35 (2d ed. 1948).

also be relevant, though not conclusive, evidence of a specific intent to cause violence.

It may be argued that a doctrine admitting the relevance of intent but insisting on concrete evidence would provide an added incentive for police to utilize a number of unseemly methods of fact-finding. It is unlikely, however, that the mere possibility of a permit denial would lead to the tapping, bugging, or infiltrating of groups that would not otherwise be thought to merit such expensive surveillance.

Thus, in cases in which the purpose and the message of a demonstration diverge, proof of specific intent on the part of the applicants to engage in or provoke violence should be held to be a constitutionally permissible reason for prohibiting an assemblage, either by injunction or permit denial.

D. *The Fear of a Hostile Audience*

It is a harsh fact of life that the exercise of speech by sincere, well-behaved protestors is all too often disrupted by roving bands of toughs.[108] Yet, it is unthinkable that such a "heckler's veto"[109] should rise to the dignity of a constitutional principle. On the other hand, it would be almost perverse if the first amendment, with its identity as a child of the Enlightenment and its imagery of the market place of ideas, should wind up pointing the nation down the path of confrontation politics by limiting governmental power to prevent more-or-less predictable bloodbaths. While this basic dilemma permeates all of the hostile-audience cases, it is not always of uniform severity. The calculus can vary depending, among other things, upon the number and behavior of the speakers, the nature of the speech, the availability of police resources, the amount of advance notice of the demonstration, the presence or absence of spectators sympathetic to the speakers, the feasibility of identifying the hecklers, and the location of the confrontation.

In dictum, the Supreme Court has been forthright and bold in attacking the hostile-audience problem: "Constitutional rights may not be denied simply because of hostility to their assertion or exercise . . . ."[110] The holdings on the subject, however, tend to be

108. Probably the most dramatic example of this phenomenon was the recent series of escapades by the Hard-Hats, a group of New York City construction workers, against anti-war demonstrators. *See* N.Y. Times, May 9, 1970, at 1, cols. 5-6.

109. The phrase is Professor Kalven's. *See* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 140-45 (1965).

110. Watson v. City of Memphis, 373 U.S. 526, 535 (1963), quoted with approval in Cox v. Louisiana, 379 U.S. 536, 551 (1965). Similarly, the Court has stated, "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of the hearers."

more evasive, inscrutable, and easily narrowed. In *Hague v. CIO*,[111] for example, a five-man majority held unconstitutional on its face a scheme providing that "a permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage . . . ."[112] However, only three justices subscribed to the pertinent part of the one opinion which discussed the problem,[113] and that opinion was careful to point out the many instances in the record of arbitrary suppression and to note that "the prohibition of all speaking will undoubtedly 'prevent' such eventualities."[114] Similarly, *Fiener v. New York*,[115] the only Supreme Court decision upholding a breach-of-the-peace conviction in part because of the threat of a hostile audience, was carefully qualified. The majority observed that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker"[116] and stressed that in the case at bar the police were faced with an ongoing crisis. The majority also noted that the speaker had "[passed] the bounds of argument or persuasion and [undertaken] incitement to riot . . . ."[117]

Last term the Supreme Court passed up an opportunity to clarify the law in this most troublesome area. *Gregory v. City of Chicago*[118] presented a fact situation that could have come from a law school examination hypothetical: eighty-five perfectly behaved civil rights protestors were picketing the home of the mayor of Chicago; a special detail of some one hundred Chicago policemen were making every conceivable effort to protect the protestors; a manageable situation existed for about one hour and then a crisis developed—the hostile crowd of onlookers from the neighborhood grew suddenly to two thousand, and eggs, rocks, and bottles were thrown at the demonstrators by hecklers able to lose themselves in the crowd. The police finally asked the leader of the demonstration, Dick Gregory, to disband his group. He refused, and as a consequence was convicted of disorderly conduct. The Illinois supreme court affirmed the convic-

Street v. New York, 394 U.S. 576, 592 (1969), quoted with approval in Bachellar v. Maryland, 397 U.S. 564, 567 (1970).

111. 307 U.S. 496 (1939).

112. 307 U.S. at 502.

113. There was no opinion of the Court in *Hague*. Justice Roberts' opinion, discussing the Jersey City ordinance, was joined in by Justice Black and, in pertinent part, by Chief Justice Hughes. Justices Stone and Reed joined in the result, but only on the basis of a carefully detailed alternative theory of jurisdiction and a carefully maintained cryptic silence on the first amendment issue.

114. 307 U.S. at 516.

115. 340 U.S. 315 (1951).

116. 340 U.S. at 320.

117. 340 U.S. at 321.

118. 394 U.S. 111 (1969).

tion after carefully interpreting the Supreme Court precedents and synthesizing them into a new test:

> It is only where there is an imminent threat of violence, the police have made all reasonable efforts to protect the demonstrators, the police have requested that the demonstration be stopped and explained the request, if there be time, and there is a refusal of the police request, that an arrest for an otherwise lawful demonstration may be made.[119]

On certiorari the United States Supreme Court reversed the conviction with a cryptic four-paragraph opinion that only added to the doctrinal confusion. One sentence—"[p]etitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment"[120]—can be read to resolve with a flick of the wrist not only the hostile-audience problem in all its complexity but also the almost equally difficult issue of residential picketing.[121] A few sentences later, however, the majority seemed to rest its holding on the conclusion that the record was "totally devoid of evidentiary support"[122] to establish the offense of disorderly conduct. Since the Illinois supreme court had included in its definition of disorderly conduct the refusal to obey a police request to stop a demonstration in the face of imminent violence amid reasonable police efforts to contain the audience,[123] and since the record amply supported a finding of disorderly conduct as so defined, the "no evidence" holding of the Supreme Court would seem to be indefensible. It can be explained only by interpreting it as an oblique holding that the Illinois supreme court's redefinition of disorderly conduct could not be operative, either because it came too late—after the charge to the jury and the verdict[124]—or because the presence or absence of a hostile audience can never be a factor in defining the freedom of speech. Since the former explanation—the tardiness of the redefinition of the offense—was listed in the last paragraph of the opinion as an independent ground for reversal, the most plausible interpretation of the *Gregory* holding is that it indeed redeems the promise of

119. Chicago v. Gregory, 39 Ill. 2d 47, 60, 233 N.E.2d 422, 429 (1968).

120. 394 U.S. at 112.

121. *See* Kamin, *Residential Picketing and the First Amendment*, 61 Nw. U. L. Rev. 177 (1966); Comment, *Picketing the Homes of Public Officials*, 34 U. Chi. L. Rev. 106 (1966). *See also* Hibbs v. Neighborhood Organization To Rejuvenate Tenant Housing, 433 Pa. 578, 252 A.2d 622 (1969).

122. The doctrine that the Court can reverse a conviction which is not based on any evidentiary support was initiated in Thompson v. Louisville, 362 U.S. 199 (1960).

123. *See* text accompanying note 119 *supra*.

124. *See* note 28 *supra*.

earlier dicta[125] that the hostile audience is a constitutionally impermissible factor to be considered in regulating demonstrations.

In the Court's most recent skirmish with the hostile-audience problem, *Bachellar v. Maryland*,[126] it reversed a breach-of-the-peace conviction because the trial judge's charge to the jury would have permitted a guilty verdict for, among other things, "conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it."[127] The Court, speaking with rare unanimity, once more enunciated a clear statement of principle: " '[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers' . . . or simply because bystanders object to peaceful and orderly demonstrations."[128] It is important to note, on the other hand, that none of the bystanders in *Bachellar* had translated his resentment into action, that the Court's general and sweeping language stopped short of that particular permutation of the problem, and that the opinion curiously failed to cite *Gregory*. Nonetheless, it is probably accurate to read *Bachellar* as further support for the proposition that audience hostility can never justify a constriction of the right to assemble.

It would be a mistake, however, to attach much importance to the *Gregory* and *Bachellar* holdings, for surely the hostile-audience problem is too subtle and too important to be conclusively resolved by the speculative and convoluted implications of those two cases. Perhaps the hostile audience never should be a cognizable factor in classic free speech locations such as capitol grounds, parks, and major parade routes, but should be a relevant factor in such sensitive areas as residential neighborhoods and schoolyards, where many of the spectators may be "captive."[129] In addition, perhaps the problem of an unexpected and uncontrollable hostile audience ought to justify some form of minimal, though involuntary, restraint such as placing the demonstrators in temporary protective custody, although this solution presents the danger that the minimal nature of the restraint may lead to its abuse by overly cautious, or personally hostile, police.

125. *See* note 110 *supra* and accompanying text.

126. 397 U.S. 564 (1970).

127. 397 U.S. at 565 n.3.

128. Street v. New York, 394 U.S. 576, 592 (1969), quoted at 397 U.S. at 567.

129. In Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 509 (1969), the Court appears to have adopted a test whereby serious disciplinary problems created by hostile classmates would justify restrictions of speech on school premises. *See also* Guzick v. Drebus, 305 F. Supp. 472 (N.D. Ohio 1969).

Whether or not these suggestions merit acceptance in dealing with an unanticipated and ongoing hostile mob, the problem is not so perplexing in the permit application context. Then, the hostile audience is not an actuality but merely a threat. The threat may be largely imagined or invented by paranoid or hostile city officials; it almost certainly will be exaggerated. Even if accurately gauged, the threat may never materialize, especially if the municipality makes it clear that it will support the demonstrators in their attempt to exercise their first amendment rights. Thus, at the permit application stage, the choice need not be between legalized vigilantism and bloodbath, since the advance notice gives the city an adequate opportunity to protect the demonstrators—if necessary by requesting the governor to call out the National Guard, which, after all, ought to be employed as readily to protect human beings exercising their constitutional rights as it is to protect merchandise. In contrast to the on-the-spot, uncontrollable emergency, it would seem to be a greater spur to vigilantism and a greater symbolic defeat for free speech if the legal system were to give in to a threat that *could* be contained, albeit by drastic action.

Admittedly, ignoring the threat of a hostile audience in the permit application context gives rise to some special problems. The lead time makes possible the emergence of a poker mentality whereby both the protestors and their opponents may become so steeped in their own bluffs that they are forced, against their better judgment, to play their hands. Also, public outrage at property damage stemming from the demonstration is likely to be greater when "there was time to prevent it."

These considerations should not, however, obscure the fact that in the permit application context the essential regulatory interest is not the prevention of violence, but rather the avoidance of cost—the cost of adequately policing the event. The weighty factor of violence prevention can be added to the scales only in diluted form—the possibility that officials may, even playing it safe, underestimate the law-enforcement resources that may be needed. This combination of economizing and fear of miscalculation would seem always to be outweighed by the speech interest, not to mention the interest in avoiding any incentive to vigilante activity. At the very least this is true when the demonstrators have not unreasonably increased the law-enforcement cost by baiting the hecklers, employing a cast of thousands, or returning to demonstrate for several days in succession. Moreover, even when these three variables enter the picture and the

protestors can no longer pose as innocents abroad, it is still preferable to keep the hostile-audience factor out of the balancing equation, since limitations more susceptible to objective application—cost assessments,[130] restrictions on repetition,[131] emergency curfews[132]—can adequately protect the city's fiscal needs and regulatory interests. There is no pragmatic need to sacrifice, and indeed there is every symbolic and administrative reason to preserve, the absolute purity of the principle already recognized by several lower courts,[133] that the fear of a hostile audience is never to be considered in ruling upon permit applications or granting injunctions against demonstrations.

E. *The Past Conduct of the Applicant*

Evidence of past conduct can be highly relevant in predicting the consequences of allowing a particular demonstration. In the context of group activity, such evidence can bear not only on the intentions of the leaders, but also on their ability to control their legions.[134] No doubt, standards of the "good character" genre lend themselves readily to disguised censorship,[135] but that danger can be minimized by limiting the decision-maker's consideration of past conduct to that which has been adjudicated in criminal proceedings or at permit-revocation hearings with adequate procedural safeguards. A "moratorium" on demonstrating by those who have previously exceeded the bounds of legality may be the only effective regulatory weapon against those demonstrators whose violations are too petty as a matter of individual fairness or martyr-avoidance strategy to justify incarceration, yet are, from the viewpoint of a well-funded movement, worth the cost of any fines.

Ironically, it may be that a constitutional ban on considering past conduct at the prior-restraint stage would be *harmful* to free speech. City officials and judges will have impressions about the past

130. *See* pt. II. H. *infra.*

131. *See* text accompanying note 142 *infra.*

132. *See* pt. II. F. *infra.*

133. *See, e.g.*, Stacy v. Williams, 306 F. Supp. 963, 977 (N.D. Miss. 1969); Hurwitt v. City of Oakland, 247 F. Supp. 995 (N.D. Cal. 1965); Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965); Rockwell v. Morris, 12 App. Div. 2d 272, 211 N.Y.S.2d 25 (1961).

134. *Cf.* Hurwitt v. City of Oakland, 247 F. Supp. 995, 1005 (N.D. Cal. 1965), in which the court stated that a permit cannot be denied simply because the applicants do not have an established organization.

135. *See* Smith v. University of Tenn., 300 F. Supp. 777, 782 (E.D. Tenn. 1969); Norton v. Ensor, 269 F. Supp. 533 (D. Md. 1967); Evans v. Lepore, 26 N.J. Misc. 215, 59 A.2d 385 (Sup. Ct. 1948); Borough of Edgewater v. Cox, 123 N.J.L. 212, 8 A.2d 375 (Ct. Err. & App. 1939); City of Bowling Green v. Lodico, 11 Ohio St. 2d 135, 228 N.E.2d 325 (1967).

conduct of would-be demonstrators and are likely to be affected by those impressions no matter how objective the formal standards for decision-making may be. It can be argued that legitimating the consideration of properly adjudicated past conduct may satisfy the urge to take such conduct into account and may also give the applicants the opportunity to correct any misconceptions that may reside in the rumor-fed minds of the decision-makers. Also, a prohibition on considering past conduct at the prior-restraint stage might create pressures at other checkpoints to keep potential troublemakers off the streets. Constitutional supervision may be less effective if the felt need to control future demonstrations should enter into decisions to arrest, press charges, set bail, or impose probation conditions.

The Supreme Court has addressed the problem of the consideration of past conduct at the prior-restraint stage only once. The defendant in *Kunz v. New York*[136] was denied a permit because he had violated the terms of a previous permit by ridiculing "two great religions."[137] In affirming his conviction for speaking without a permit, the New York Court of Appeals held that a previous revocation "for good reasons" is a permissible standard for denying a permit request, at least when "[t]he commissioner had no reason to assume, and no promise was made, that defendant wanted a new permit for any uses different from the disorderly ones he had been guilty of before."[138] In reversing the New York court, the Supreme Court limited its holding to a very narrow ground: since the statute set out no standards for revocation, to use revocation itself as a standard for denying a permit was simply a two-step process of unbridled administrative discretion.[139] The Court's dictum, however, was expansive: "[t]he court below has mistakenly derived support for its conclusions from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder and violence."[140] While it can be argued that the New York court's reliance on past conduct was unconstitutional only because the permit scheme did not contain objective standards for considering such conduct, it is significant that the Supreme Court punctuated its mention of "appropriate public remedies" with three consecutive references to the distinction be-

136. 340 U.S. 290 (1951).

137. People v. Kunz, 300 N.Y. 273, 277, 90 N.E.2d 455, 457 (1949).

138. People v. Kunz, 300 N.Y. 273, 277-78, 90 N.E.2d 455, 457 (1949).

139. 340 U.S. at 293.

140. 340 U.S. at 294.

tween prior restraints and subsequent punishments.[141] It is more natural, therefore, to read the *Kunz* dictum to stand for the proposition that the denial of a demonstration permit can never be predicated on past conduct, even if that conduct has been adjudicated with procedural safeguards and seems highly relevant for predicting future behavior.

An across-the-board prohibition on considering past conduct at the prior-restraint stage would have one unmistakable virtue: simplicity. That is no mean credential for a rule of law that must be administered in many instances by municipal officials with no legal training and almost always in situations in which passions and paranoia run high and time is at a premium. Moreover, even if the Court's assertion in *Kunz* concerning the adequacy of subsequent punishment must be viewed with skepticism, it does serve as a telling reminder that this problem is properly viewed as one part of the monumental debate over preventive detention: when can the genetic, psychological, sociological, or statistical probability that a citizen will commit a crime in the future justify punishing him, by incarceration or diminution of his constitutional rights, *before* he commits that crime? There is no need, however, to resolve the past conduct issue on such a simple plane as the simplicity of a per se rule or on such a complex plane as the moral propriety of preventive detention. Three intermediate levels of inquiry can be employed: (1) Is past conduct of consistent probative value for predicting the consequences of granting permits? If not, can rules be formulated for isolating the past conduct that is of predictive value? If not, can the determination safely be committed to administrative discretion? (2) Is there a better stage in the process of demonstration regulation at which to consider the predictive value of past conduct? (3) How would legitimating the consideration of past conduct at the prior-restraint stage affect administrative behavior at other points in the demonstration regulation process?

First, it is evident that the predictive value of past conduct fluctuates greatly from case to case. The outcome of each mass gathering depends upon a myriad of intangible variables: the mood of the speaker and of the crowd, the civility of the police, the weather, the reactions of bystanders, the presence or absence of the media, the power struggles between the various protest leaders, the symbolic significance of the event, the machinations of agents-provocateur attempting to discredit the group. In the context of mass demonstra-

141. 340 U.S. at 294.

tions, the relevant individual conduct is most often the result of excitement and overreaction; the criminal liability is frequently of the vicarious or collective variety—mob action, refusal to disperse, unlawful assembly, breach of the peace, obstructing public passageways. To predict future behavior on the basis of these indices is to engage in nothing more than soothsaying.

There are, however, specific individuals or groups for whom this generalization will not be true: the one-theme religious zealot; the political martyr-of-the-moment who may be able to ignite the most volatile passions in his followers merely by stating his cause; the avowedly violent group such as the Weathermen (whose revolutionary appeal apparently depends on proving that intangible variables have nothing to do with the outcome of its demonstrations). Were it possible to legitimate consideration of prior conduct in these exceptional situations without opening up a Pandora's box of administrative discretion, the argument for doing so would be very strong indeed.

Conceivably, consideration of past conduct could be limited to convictions for demonstration-related offenses that entail personal action rather than vicarious or group responsibility—for example, malicious destruction of property, assault, or resisting arrest. Also, something like a habitual-offender concept could be employed: three prior assault convictions might afford a sound basis for predicting misbehavior at a proposed demonstration whereas one conviction might not. In addition, a "statute of limitations" of, for instance, two years might reasonably be adopted so that convictions stemming from a different protest era would not count against the demonstrators. One drawback, however, of a rule that would permit this limited consideration of past conduct at the prior-restraint stage would be the creation of some undesirable incentives: prosecutors hoping to prevent future demonstrations would be encouraged to go for convictions rather than to drop charges, and accused demonstrators hoping to preserve their future options would be encouraged to contest criminal charges rather than plead guilty—both pressures in the direction of further burdening scarce judicial resources. In addition, even a carefully circumscribed legitimation of considering past conduct might encourage officials improperly and covertly to consider other kinds of past conduct such as general reputation, arrests, and unrelated convictions.

Moreover, even if this circumscribed consideration of past conduct at the prior-restraint stage did not have such serious drawbacks, there is a preferable alternative: if the right to demonstrate is to be

limited on the basis of past conduct, this should be done at the sentencing stage as part of the punishment for the initial conduct. Incarceration is not the only alternative: should mercy or martyr-avoidance be of high priority, probation could be conditioned on a promise by the defendant to refrain from participation in future demonstrations.[142] This control mechanism is not without risks of its own, the most serious being that its very character as a more lenient alternative may lead to its careless use by judges and passive acceptance by defendants.[143] But at least the initial decision is always made by a judge, and always in the course of regular rather than time-pressured proceedings; there is a fixed duration to the restriction; and the determination is not made with an eye to a specific, upcoming, and unpopular demonstration. Flexibility can be achieved by permitting the probation officer to grant a temporary waiver of the conditions of probation, although this power is likely to be exercised too cautiously to be of much importance. A final consideration is economy. Limiting participation in future demonstrations at the sentencing stage merely requires one more decision concerning a defendant already before the court, whereas looking into the past conduct at the prior-restraint stage may require an enormous extra expenditure of time. Thus, if consideration of past conduct is ever to be a control mechanism in regulating demonstrations, it should be utilized only at the sentencing stage. A permit never should be denied because of the past conduct of the applicant.

A further reason for this conclusion is that the circumscribed consideration of past conduct would be enforceable only against specific individuals, not against entire groups—a circumstance that seriously diminishes the violence prevention advantages that might serve to justify the consideration of past conduct in the first place. Not only would it be unfair to deny a group the right to demonstrate merely because a few of its members had the requisite multiple convictions, it would also be a futile exercise because front groups could be created at will. It would be possible to keep multiple offenders off the speakers' platform—more difficult than to keep them out of the parade—but it would seem to be difficult to defend on violence prevention grounds the practice of allowing the group to congregate while making martyrs of some of its members.

142. This practice raises extremely difficult first amendment questions that are beyond the scope of the present inquiry. For present purposes it is sufficient to note that, to date, courts and commentators have found the practice permissible. *See* United States v. Smith, 414 F.2d 630 (5th Cir. 1969); Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 203-04 (1967).

143. There may also be serious procedural problems in obtaining appellate review. *See* Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 188-96 (1967).

F. *A Background of Violence*

The concerns about message, purpose, hostile audience, and past conduct all have a common denominator: the fear of violence. In the year 1970 no extraordinary powers of persuasion are needed to make the point that the prevention of violence is of the highest priority—indeed it occupies a preferred position—in a civilized society. The preceding four sections have subdivided this concern about violence into its component parts, and have treated them individually. The conclusions have been heavily influenced by the danger of faulty predictions of violence, whether such predictions are caused by paranoia, bad faith, laziness, or incompetence. Now violence prevention must be treated as a cognate concern, not in a context of speculation, but in one of gruesome actuality. Surely the balancing calculus must change when protestors walk through a world of broken glass, drawn bayonets, and tear gas in order to file their permit applications.

The Supreme Court's most direct pronouncement on the matter is not especially helpful; the Court finds the problem "thorny."[144] Cases from another judicial era hold that a governor's declaration of "martial law" or other invocation of emergency powers, at least if backed up by an actual deployment of the National Guard, justifies some redefinition of traditional constitutional safeguards, but "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[145] The most extreme case on the subject is *Moyer v. Peabody*,[146] in which a unanimous Supreme Court gave its blessing to the preventive detention—2½ months without bail or criminal charges—of a union leader after labor violence led to the calling out of troops and the declaration of a state of insurrection. There is no way of knowing whether the *Moyer* holding could command a majority of the Court today, or whether an emergency declaration not involving actual military deployment can justify exceptions to normal Bill of Rights requirements.[147]

The Court has indicated in the context of labor picketing that, even in the absence of a formal emergency, a background of violence is a relevant factor in interpreting the first amendment. The leading

144. Carroll v. President & Commrs., 393 U.S. 175, 180 (1968).

145. Sterling v. Constantin, 287 U.S. 378, 401 (1932).

146. 212 U.S. 78 (1909).

147. *See generally* Note, *Judicial Control of the Riot Curfew*, 77 YALE L.J. 1560, 1566-68 (1968); Comment, *The Riot Curfew*, 57 CALIF. L. REV. 450, 486-87 n.202 (1969); Comment, *Constitutional and Statutory Bases of Governors' Emergency Powers*, 64 MICH. L. REV. 290 (1965).

case, *Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Incorporated*,[148] stands as a reminder that violence, either calculated or wanton, is hardly a recent arrival on the American political scene:

> Besides peaceful picketing of the stores handling Meadowmoor's products, the master found that there had been violence on a considerable scale. Witnesses testified to more than fifty instances of window-smashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large measure ruined; two trucks of vendors were burned; a storekeeper and a truckdriver were severely beaten; workers at a dairy which, like Meadowmoor, used the vendor system were held with guns and severely beaten about the head while being told to 'join the union'; carloads of men followed vendor's trucks, threatened the drivers, and in one instance shot at the truck and driver. In more than a dozen of these occurrences, involving window-smashing, bombings, burnings, the wrecking of trucks, shootings and beatings, there was testimony to identify the wrongdoers as union men.[149]

Against this background of violence, the Supreme Court held that all picketing, including peaceful picketing, could be enjoined. The Court noted that "[t]hese acts of violence are neither episodic nor isolated,"[150] that "it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful,"[151] and that the injunction "is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation."[152] "Continuing intimidation" was found to exist in spite of the fact that all of the truck-seizures and most of the window-smashings and bombings had taken place three years before the injunction was issued, and the only instances of violence that had occurred in the preceding year were seven window-smashings and two store-bombings.[153]

Moyer, Meadowmoor, and related Supreme Court cases[154] are helpful on the problem of violence and mass demonstrations only at

148. 312 U.S. 287 (1941).

149. 312 U.S. at 291-92.

150. 312 U.S. at 295.

151. 312 U.S. at 294.

152. 312 U.S. at 298.

153. 312 U.S. at 314-15 n.16 (Justice Black, dissenting).

154. *E.g.*, Youngdahl v. Rainfair, 355 U.S. 131 (1957) (pattern of violence sufficient to divest NLRB of jurisdiction over on-site picketing not established). *See also* United Farm Workers Organization Comm., AFL-CIO v. La Casita Farms, 439 S.W.2d 398 (Tex. Civ. App. 1969).

a very high level of generality. It is good to know that the invocations of martial law and emergency powers support some restrictions on constitutional liberties, but that the ultimate decision whether to impose restrictions remains in the hands of the judiciary, and entails the familiar reconciliation of individual and societal demands. It is also good to know that speech activities may lose their protected quality if they are related to violent activities in some measure of causality, proximity, and continuity. On the other hand, so much has transpired in the field of civil liberties since *Moyer* was decided in 1909, and labor disputes are so focused, so drawn out, and so colored by economic coercion, that any attempt to apply the narrow holdings and doctrines of *Moyer* and other labor cases in the mass-demonstrations context must take on a distinctly Procrustean quality.

Approaching the issue, then, with only the broadest of precedential guidelines, how can a background of violence be made an admissible consideration without giving city officials a cornucopia of abusable discretion? Two checking devices might be employed. The first would attempt to define a threshold of violence—in terms of intensity, dispersion, geographic and temporal proximity, and continuity —that must exist before the factor could be considered at all. The second checking device would be similar in spirit, but would mark the threshold of admissibility not directly by trying to measure the violence, but rather indirectly by conditioning any limitation on the right of assembly on a corresponding willingness by the government to take other drastic and expensive measures to control the situation, such as calling out the National Guard, imposing a curfew, or banning all public meetings.

Directly defining the threshold of violence is the more difficult approach, but a permit denial or injunction based on such an effort should be upheld as long as certain definitional strictures are observed. First, the violence must be serious enough to cause either personal injuries requiring hospitalization or substantial property damage in dollar terms—not simply a few broken windows. The violence also must be in the same general area as that requested for the proposed demonstration, because a change of setting frequently breaks the pattern of violence by altering such variables as symbolic targets, potential victims, hecklers, and hideouts. Furthermore, the violence must be continual enough to constitute a pattern or background; while one unfortunate occurrence should not be enough, two successive days of violence can be said to establish such a pattern. Finally, the violence must be recent. To borrow the language, although not the holding, of *Meadowmoor*, there must be a "momen-

tum of fear,"[155] a "continuing intimidation."[156] Generally, this will mean that the violence must have occurred within the preceding week. The city should not, however, be required to show that the particular applicants were associated with the previous violence: when conditions are severe enough to meet the foregoing criteria, municipal officials should have the power to prevent all mass gatherings.

Another way to gauge the background of violence is to look to the other means the government is willing to employ in order to counter the threat of more violence. Probably the most drastic means is the imposition of a general curfew. If a city is willing to subject its law-abiding citizens to the tremendous inconvenience and expense caused by a general curfew,[157] then the claim that there is a significant background of violence gains a good deal of credibility. Indeed, such a claim is so credible that a per se rule is justified: it should be constitutionally permissible to prohibit any demonstration in an area where, and at an hour when, a general curfew is in force. Such prohibitions could be challenged only by directly attacking the constitutional validity of the curfew itself,[158] or by showing that the curfew was being enforced so haphazardly that it was no longer a meaningful credibility check. One difficulty with a per se rule would be that at the time of the prior-restraint decision it would not be known whether the curfew would still be in effect on the date proposed for the demonstration, but that problem can be solved by issuing conditional permits and injunctions.[159]

Another measure sometimes taken by cities to counter a threat of impending violence is a ban on all public meetings, or, more drastically, on all congregations of more than a given number of people.[160] The imposition of such a mini-curfew would mean that the regularly scheduled P.T.A. meeting or Lions Club picnic could not be held, and to that extent it would be somewhat of a credibility check on the city government. But these inconveniences are comparatively minor, especially since there may be no scheduled meetings for the typically short duration of the curfew and since any events that might be planned could usually be rescheduled. Thus, a

155. 312 U.S. at 294.

156. 312 U.S. at 298.

157. *See* Note, *Judicial Control of the Riot Curfew*, 77 YALE L.J. 1560, 1564-65 (1968).

158. *See id.* at 1570-73.

159. The standard parade permit might contain the proviso that it is void when a general curfew is in effect.

160. Several cities have employed such measures. *See* Note, *supra* note 157, at 1561 n.6.

city's willingness to prohibit all public meetings or sizable gatherings cannot be regarded as an adequate index of the gravity of the situation; nothing short of a *general* curfew should, by itself, justify a permit denial for, or an injunction against, the staging of a proposed demonstration.

A third extraordinary means of violence prevention is the calling out of the National Guard. As is the case with the imposition of a general curfew, such action is costly and highly disruptive of the lives of average citizens; governments are not likely to take this course of action unless the need is real. On the other hand, a Guard call-out is not so safe a credibility check as a general curfew since the Guard deployment is not subject to any kind of meaningful direct challenge in the courts and does not necessarily inconvenience a broad segment of the population. In recent years there have been a number of instances—in Wilmington, New Haven, and Washington, D.C., to name a few—in which the National Guard was called out when there was no immediate background of actual violence, but rather only an apprehension thereof. Moreover, it might conceivably be argued that the presence of the National Guard ought to be a factor in favor of allowing the demonstration, since then any incipient violence that might arise could be more easily contained. In light of these conflicting considerations, the case for giving special significance to a Guard call-out—either in the form of a per se rule or a presumption—is not persuasive.

Thus, the first amendment should be interpreted to allow municipalities to refuse to issue permits or to obtain injunctions against demonstrations whenever a serious immediate background of violence can be established. This background should be provable by the city in either one of two ways: (1) direct evidence of the violence in terms of intensity, dispersion, geographic and temporal proximity, and continuity; or (2) indirect evidence of the seriousness of the situation as shown by the city's willingness to impose a general curfew on its citizens. Declarations of martial law and decisions to deploy the National Guard should not alter the calculus.

G. *Failure To Make a Timely Application for a Permit*

Most parade permit ordinances require applicants to submit their requests a certain period of time in advance of the scheduled event.[101]

161. Of twenty-two municipalities responding to an inquiry on this point, thirteen have advance-filing requirements: Albany (6 hours), Atlanta (5 days), Berkeley (20 days for parades, 48 hours for meetings), Cleveland (5 days), Kansas City, Mo. (48 hours), Los Angeles (40 days), Louisville (5 days), Memphis (3 days), New York (36 hours), Portland (60 days), San Antonio (15 days), San Francisco (24 hours), Seattle (48 hours). Personal correspondence on file with the author.

This lead time can be important for a number of reasons. It can enable city officials to evaluate the competing public uses, to put the police department on notice concerning how many men will have to be on duty, and to prepare a temperate response to the protestors' demands and tactics. Advance notice can also be helpful to the news media in assigning reporters and transporting equipment. In addition, public inconvenience can be minimized if uninterested citizens can be warned in advance to take a different route or to shop on another day.

The Supreme Court has never addressed the issue whether these advance-filing requirements are consistent with the first amendment. Recently, a federal district judge in Mississippi struck down a one-hour advance-notice requirement and that decision was affirmed per curiam by the Fifth Circuit.[162] However, the opinion of the district judge appears to have been strongly influenced by the unique context of the case: "there was nothing about this particular demonstration that required extra police vigilance";[163] and "it would seem that the city officials, in enacting, enforcing, and prosecuting under this ordinance, were motivated primarily by a desire to impede and, if possible, totally halt all organized civil rights marches within the corporate limits."[164] A thirty-to-sixty-day advance-filing requirement has also been struck down,[165] but time periods of twenty-four[166] and forty-eight[167] hours have been upheld, the latter by the Second Circuit "as applied to a demonstration, such as this one, that had been planned well in advance . . . ."[168]

As a basic constitutional proposition, forty-eight hours should be the maximum limit for per se advance-filing requirements. A longer lead time is of course desirable from the viewpoint of both the

162. Robinson v. Coopwood, 292 F. Supp. 926 (N.D. Miss. 1968), *aff'd. per curiam*, 415 F.2d 1377 (5th Cir. 1969). *See* Note, *The Constitutionality of a Requirement To Give Notice Before Marching*, 118 U. PA. L. REV. 270 (1969).

163. 292 F. Supp. at 933.

164. 292 F. Supp. at 934.

165. York v. City of Danville, 207 Va. 665, 152 S.E.2d 259 (1967). The court suggested that a lead-time requirement of twenty-four hours or less would be upheld.

166. Commonwealth v. Hessler, 141 Pa. Super. 421, 15 A.2d 486 (1940).

167. Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

168. 407 F.2d at 84. *See also* Wolin v. Port of New York Authority, 392 F.2d 83, 94 (2d Cir. 1968) ("[s]uch notice requirements must be examined with special care in view of the tendency to abuse"); Stacy v. Williams, 306 F. Supp. 963, 972-74 (N.D. Miss. 1969). In A Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C. Cir. 1969), referring to the special need to "assure the safety of the President," the court allowed enforcement of a National Park Service fifteen-day advance-filing requirement for demonstrations near the White House. Recently, President Nixon graciously waived the requirement to allow Jane Fonda, Dr. Benjamin Spock, and a hundred thousand other demonstrators to express their dismay over the United States' intervention in Cambodia. N.Y. Times, May 10, 1970, § 1, at 1, col. 8; *id.*, § 1, at 24, col. 6.

demonstrators and the municipality, especially if the dispute will be brought to the courts. But with regard to a blanket refusal by the city even to consider an application for a permit, the overriding administrative considerations begin to fade out rapidly beyond the forty-eight-hour mark. Policemen and newsmen are frequently deployed on shorter notice, and the mammoth demonstrations which require extraordinary policing generally take more than forty-eight hours to organize; the data on competing uses can be researched in a day or two; the most effective warning to disinterested citizens will likely be at the same time and place twenty-four hours before the demonstration ("tomorrow at this time this street will be closed"). By the same token, while many municipalities seem to favor shorter advance-notice provisions,[169] or none at all,[170] a city's claim that it needs or greatly benefits from more than one day's notice before a demonstration is certainly credible, and should ordinarily satisfy the demands of the first amendment.

Special problems are posed by demonstrations which are either spontaneous or organized on short notice in response either to local grievances—such as the arrest of a protest leader—or to monumental national events—such as the assassination of Martin Luther King or the intervention in Cambodia. These spontaneous gatherings are in many ways the most genuine form of expression—a refreshing change from the carefully orchestrated "pseudo-events"[171] that play such a dominant role in the contemporary political scenario. Moreover, because emotions run high on these spontaneous occasions, it is especially important that the permit process, with whatever semblance of notice and cooperation it can contribute, be workable. City officials will often waive the lead-time requirement out of empathy or fear,[172] and a few ordinances provide explicitly for an exception to the advance-filing requirement for "good cause"[173] or "in the discretion of the Chief of Police for any unexpected occasion."[174] Nevertheless, some municipalities retain such a boundless capacity for insensitivity[175] that a permit denial under such circumstances may sometimes

169. *E.g.*, Albany, New York City, San Francisco. *See* note 161 *supra.*

170. *E.g.*, Birmingham, Boston, Boulder, Colo., Champaign, Ill., Dallas, Denver, Ithaca, N.Y., Madison, Oakland. Nine of twenty-two responding to the inquiry. *See* note 161 *supra.*

171. *See* D. BOORSTIN, THE IMAGE (2d ed. 1964).

172. Such subjective pressures operate not only on city bureaucrats, but on the judiciary as well. *See* text following note 272 *infra.*

173. San Antonio, Tex., Ordinance 36221, § 4(3), Feb. 15, 1968.

174. SEATTLE, WASH., CITY CODE § 21.60.080 (1967). *See also* LOS ANGELES, CALIF., MUNICIPAL CODE § 103.111(0) (1969).

175. The Austin, Texas, City Council recently invoked its fifteen-day advance-filing

demand judicial attention. With a forty-eight-hour advance-notice provision, further constitutional intervention should be confined to exceptional cases in which unforeseen events of obvious importance make immediate protest efficacious. In those few instances, however, the considerations of municipal efficiency and public convenience that justify an advance-filing requirement under normal conditions must give way before the weighty first amendment interest in spontaneous expression.

H. *Refusal or Inability To Pay the Costs Associated with the Demonstration*

Policing demonstrations costs money, as does administering a permit system. Who should pay? The statute upheld by the Supreme Court in *Cox v. New Hampshire*[176] required marchers to pay the costs—up to 300 dollars—of policing the event.[177] In movie censorship cases, lower courts have upheld both flat permit fees and fees based on film footage.[178] The Supreme Court cases striking down "speech taxes"[179] have all carefully distinguished assessments reasonably related to administrative costs. Thus, the principle of pay-as-you-go, even for "free" speech, appears to be well established.

There is more behind the principle than sterile precedent. User taxes are often hailed as the fairest of all.[180] Moreover, if the city is forced to defray administrative costs, it is likely to be more resistant to permit requests—at a cost to both sides in that energies which could be devoted to cooperation and planning are wasted in litigation. Large and frequent demonstrations can severely strain a police department, making patrolmen assigned to such events resentful and vindictive, and diminishing the level of protection afforded in other

requirement to deny a permit to a crowd of twenty thousand citizens seeking to march in protest against the Cambodian intervention. The local federal district judge ordered that the permit be issued. Ad Hoc Strike Comm. of the Univ. of Texas v. Miles, No. A-70-CA-33 (W.D. Tex., May 8, 1970). *See also* Houston Peace Coalition v. Houston City Council, 310 F. Supp. 457 (S.D. Tex. 1970).

176. 312 U.S. 569 (1941).

177. 312 U.S. at 572.

178. Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966); Universal Film Exchanges, Inc. v. City of Chicago, 288 F. Supp. 286 (N.D. Ill. 1968). In Freedman v. Maryland, 380 U.S. 51, 56-57 n.3 (1965), the petitioners claimed that the permit fee was an impermissible "speech tax," but the Court did not reach the issue.

179. Follett v. Town of McCormick, 321 U.S. 573 (1944); Jones v. Opelika, 319 U.S. 103 (1942); Murdock v. Pennsylvania, 319 U.S. 105 (1942); Grosjean v. American Press Co., 297 U.S. 233 (1936). *See also* NAACP v. City of Chester, 253 F. Supp. 707 (E.D. Pa. 1966), in which the court struck down a $25 fee for operating a sound truck absent any showing by the city that the fee was reasonably related to the cost of enforcing the soundtruck ordinance.

180. *See* R. MUSGRAVE, THE THEORY OF PUBLIC FINANCE ch. 4 (1959), and references cited therein.

neighborhoods. At some point, repeated demonstrations can amount to an act of political ransom, with the protestors holding the city's police resources hostage until their demands are met. Even if the problem of economic coercion is disregarded, it can be argued that the resource allocation decision should balance not only immediately competing uses but also total use over time, and that any rationing system other than the market would be hopelessly complicated and inefficient. Charging for police protection can also be defended as a check against frivolous demonstrations and as a fair assessment for the valuable media time that is often a consequence and, indeed, a purpose of mass gatherings. The contention that such an assessment for exercising the privilege of free speech discriminates against the poor can be countered by a special provision in the scheme for indigents and by the observation that the rich are also deterred from demonstrating by the economists' concept of opportunity cost.[181]

There are precedents, however, that point in the opposite direction. The cases securing lawyers and transcripts for indigent defendants,[182] at the very least, undermine the absolute integrity of the pay-as-you-go principle, even though they are distinguishable on a number of grounds: nonindigents still have to pay, the want is more important (or at least more strongly felt), and the need for legal services arises only because of governmental initiative. Moreover, read broadly, the indigent-defendant cases may stand for the proposition that the level of assertion of constitutional rights should not be affected by personal budgetary considerations—that nonindigents are not entitled to free counsel only because they appreciate the value of the right involved and are willing to pay for it—a happy circumstance not present for other more amorphous rights such as voting and speech. This interpretation is supported by the fact that the majority opinion in *Harper v. Virginia Board of Elections*,[183] in which the Court struck down the Virginia poll tax in state elections, appears to proceed on the assumption that even an exemption for indigents would not make the poll tax constitutional; even the rich cannot be made to pay a dollar and a half to vote.

The right to assemble, like the right to vote, is the kind of right about which constitutional theorists wax eloquent[184] but for which

181. For example, a partner of Sullivan & Cromwell must forgo hundreds of dollars in billable time in order to attend a "support our boys" rally.

182. Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

183. 383 U.S. 663 (1966).

184. *See, e.g.*, Kalven, *supra* note 7, at 32.

many people are unwilling to pay; these rights require special judicial attention not because they are so fundamental, but because they are so unappreciated. Unlike voting, however, it cannot be said that society has a positive stake in the maximum assertion of the right to demonstrate. Rather, the right of assembly is somewhat like a demand deposit; it can exist only because not everyone will claim it at the same time. When the additional element of violence potential is considered, the conclusion seems warranted that assembly is indeed a right that must be rationed. While other rationing systems can be imagined—for example, a limit on the number of major demonstrations in which a person could participate during a given time period, with the city having the burden of enjoining specific individuals from further participation after proving that they had exhausted their quotas—a system based on willingness to pay, with an indigency provision, would seem to be not merely permissible, but optimal.

Unfortunately, the fairness of a payment system in principle does not necessarily mean that such a system will be fair in practice. A burdensome system of administration could undercut the theoretical protection for indigents, could filter out not only frivolous demonstrators but also those who happen to be financially cautious or busy, and could provide hostile city officials with an ideal low-visibility censorship technique in the form of inflated estimates of required police resources. Even a payment system administered in complete good faith would force demonstrators to pay in part both for the paranoia of police officials and for the antics of hecklers, since both would increase the number of officers necessarily assigned to an event.

These dangers attendant to a pay-as-you-go system are real. They cannot be adequately guarded against by a case-by-case judicial review of rejected indigency claims and police-assignment decisions. The burden of delay and doubt must be placed on the city. One permissible scheme would be to require the city to issue a police-cost estimate with every permit granted, then to require the demonstrators to make a good faith effort to collect the necessary amount by whatever means they choose—passing the hat, charging admission, soliciting advance donations—and finally to hold the sponsors of the demonstration criminally liable upon proof by the city that a good-faith collection effort was not made. Admittedly, the good faith requirement would be difficult to enforce; the sponsors' exhortation to "give generously" might have a disingenuous ring when the crowd knows that the police are to be the ultimate recipients of its largess.

Municipalities may be able to devise more effective cost-assessment schemes that are no more inhibiting to demonstrators and are

no more subject to abuse than the one outlined above. But any alternative that is more burdensome to the assertion of the right of assembly should be struck down. In particular, requirements of advance payment or suretyship should not pass first amendment scrutiny. Whatever these advance-payment schemes may gain for the city in financial security must necessarily be outweighed by the abundant opportunities they offer for abuse by unsympathetic city officials. The outcome of this balance cannot be in doubt when it is remembered that the assessment is justified in the first place not as a matter of municipal fiscal integrity, but to prevent economic coercion and the promiscuous assertion of rights.

Although the common practice among municipalities is to accept applications and issue permits free of charge, a few municipalities charge a small fee to defray the costs of administering the permit system itself.[185] A constitutional challenge to the assessment of these fees could be mounted, based on *Harper*.[186] The issue presented by these administration fees is different from the police-cost issue in that payment of the administration fees is sought in advance, and the political-ransom and police-resentment rationales are inapplicable. The assessment of such fees can, however, be defended as a minimal commitment check—especially in a city that does not charge for police—and as a rationing device that is proper for mass demonstrations but not for voting, thereby distinguishing *Harper*. Furthermore, the primary objection to an advance-payment requirement—the danger of abuse—is not present when the fee is uniform. Thus, a uniform fee based on the costs of administering the permit system—not including the city's litigation expenses—and including an indigency provision, should be upheld.

Some cities require permit applicants to have liability insurance for property damage or personal injuries that might occur as a result of the demonstration. Tort law on the problem of liability in the demonstration setting is unsettled,[187] and the first amendment would seem to impose limits of its own on the standard of liability,[188] just as it has for the torts of invasion of privacy[189] and defamation.[190] With-

185. Of twenty-five cities responding to an inquiry on this point, four charge some fees: Cleveland ($1), Denver ($4), Los Angeles ($10), Oakland ($5).

Personal correspondence on file with the author.

186. *See* text accompanying note 183 *supra*.

187. *See* Maxwell v. SCLC, 414 F.2d 1065 (5th Cir. 1969); RESTATEMENT (SECOND) OF TORTS §§ 302A, 302B, 303 (1965).

188. *See* Comment, *Negligence and the First Amendment: A Note on the Destructive Assembly*, 37 U. CHI. L. REV. 391 (1970).

189. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967).

190. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

out venturing into a prescriptive essay on this tangential subject, it is sufficient to note that innocent third parties often suffer financial and physical injury as a result of demonstrations, that the individual tortfeasors frequently cannot be identified or are judgment-proof, and that the municipality is seldom either liable or charitable.[191] If the organizers of the demonstration may be held liable,[192] why shouldn't precautions be taken to make sure that they are not judgment-proof?

There are several difficulties with an insurance requirement. First, if the sponsors are so indigent that they are judgment-proof, they may be unable to afford the liability insurance premiums. Also, this type of insurance may be very difficult, if not impossible, to obtain; would even Lloyd's insure the Weathermen? Even if insurance companies were forced to write demonstration liability policies under an assigned-risk statute, the rates would undoubtedly be astronomical,[193] and the city could discriminate against unpopular groups by varying the size of the policy demanded.[194] Moreover, peaceful groups would be forced to pay costly premiums not only because of the excesses of their own fringe members, but also indirectly because of the destructive forays of other groups with diametrically opposed views—a phenomenon that might even give these opposing groups an incentive to engage in violence.

Furthermore, viable alternatives to required liability insurance exist. If the danger of violence is great, nonparticipants can board up their shops and absent themselves from the area of the demonstration. Victims of protest demonstrations often have, or are able to obtain, extended-coverage insurance protection[195] at rates much lower than those charged to the victims of ghetto riots since the risk is not so geographically concentrated. In this regard, the Federal

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191. *See* Note, *Municipal Liability for Riot Damage*, 81 HARV. L. REV. 653 (1968); Comment, *Municipal Liability for a Policy of Permitting Riot Damage*, 47 TEXAS L. REV. 633 (1969).

192. Organizers might be held liable, in spite of their first amendment privileges, if their reckless disregard of necessary safety precautions can be proved. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

193. Conceivably the rates could be regulated, but if free assembly is to be subsidized it is difficult to see why private insurance companies rather than the government should bear the burden.

194. Protest groups at the 1968 Democratic National Convention were confronted with a $100,000-to-$300,000 insurance policy requirement, instituted for the occasion by Chicago city officials, as a condition for the issuance of a permit for a rally at Grant Park. D. WALKER, RIGHTS IN CONFLICT 68 (1968).

195. *See* Note, *Riot Insurance*, 77 YALE L.J. 541, 543-45 (1968); Note, *Compensation for Victims of Urban Riots*, 68 COLUM. L. REV. 57, 59-65 (1968).

Urban Property Protection and Reinsurance Act of 1968[196] may be of some assistance. Moreover, a number of state statutes hold municipalities strictly liable for riot damage.[197] This approach has proved too expensive in cities which have suffered major ghetto uprisings,[198] but it would seem to be financially feasible if limited to planned demonstrations. On the other hand, each of these approaches has drawbacks. Strict municipal liability, for example, might cause extra resistance by city officials to the granting of permit requests and, at the same time, extra violence by protestors whose anger or economic coercion is directed at the city administration. The point is simply that from among the several possibilities available to a city for allocating the cost of violence, any one that would force demonstrators as a class to bear the cost should be disallowed. This is so not because singling out a class of those who exercise their constitutional rights is improper per se—although it should be highly suspect—but because such a singling out can be enforced only by prepayment in the form of insurance premiums, and a prepayment requirement is certain significantly to discourage demonstrations and disproportionately to burden poor protesters.

This reasoning applies also to behavior and peace bonds.[199] While these surety devices traditionally have been required only from individuals, they may be more effective in the group context, since fear of forfeiting the bond may make moderates unusually energetic and persuasive in their efforts to control their more aggressive compatriots. The more likely result, however, is that extremist groups may intentionally cause forfeitures in order to abort promising moderate movements. Even if it were stipulated that the antics of hecklers and lunatic-fringe elements would not result in forfeiture of the bond, the precise cause of violent outbursts is usually difficult to identify. It might also be argued that peace bonds would provide a great incentive for police riots. When these considerations are added to the usual drawbacks of prepayment—possible abuse in setting the amount, the special burden on poor groups, intense personal pressure on the wealthier members of a group once more to supply financial backing—the conclusion is compelling that any attempt to extend peace- and behavior-bond requirements into the realm of demonstration regulation should be struck down.

196. 12 U.S.C. § 1749bbb (Supp. IV, 1965-1968). *See* Comment, *Municipal Liability for a Policy of Permitting Riot Damage*, 47 TEXAS L. REV. 633, 639 (1969).

197. *See* Comment, *supra* note 196, at 635-36.

198. *Id.* at 638.

199. *See generally* Note, *Peace and Behavior Bonds—Summary Punishment for Uncommitted Offenses*, 52 VA. L. REV. 914 (1966).

I. *Summary*

As a matter of constitutional law, municipalities should be able to prohibit demonstrations, either by permit denials or injunctions, only upon showing one of the following: (1) that more persons would be seriously inconvenienced by the event than would participate in it; (2) that the number of persons who would be less than seriously inconvenienced would be grossly disproportionate to the number of participants; (3) that the site, time, size, or duration of the proposed demonstration is prohibited by a uniformly enforced per se rule that is not unconstitutional in that a very high percentage of the demonstrations covered by the rule would be prohibited under the controlled-balancing standard; (4) that the applicants, after receiving a permit, have refused to inform the city of the general message or purpose of the proposed demonstration; (5) that a significant number of the demonstrators have a specific intent, manifested by specific plans, to engage in or provoke violence; (6) that a background of serious, recent, continuous, and widespread violence exists in the general location proposed for the demonstration; (7) that a fully enforced general curfew will be in existence at the time and place proposed for the demonstration; (8) that the applicants have failed to make a timely application for a permit, and could have done so since their demonstration was not in immediate response to an event of obvious importance; (9) that the applicants refuse to pay a small, uniform filing fee.

Municipalities should not be held to a strict equal protection standard in allowing demonstrations; if city officials wish to give popular groups extraordinary demonstration privileges, similar treatment for unpopular groups should not be a constitutional requirement, except in the case of a waiver of per se restrictions on size, time, place, and duration. The first amendment should be interpreted to prohibit the denial of a permit or the granting of an injunction simply because an alternative time or site for the demonstration would be preferable. As a matter of constitutional requisite, however, permit denials and injunctions should contain counteroffers of alternative acceptable times and sites.

Permit applicants should not be required to state the message or purpose of their demonstration in advance of the granting of the permit, but should be required to do so afterward. A permit never should be denied nor an injunction granted because violence is anticipated from hostile bystanders. The past conduct of the demonstrators never should be considered in ruling upon permit applications or injunction requests. In addition, formal statements of

emergency, declarations of martial law, less-than-general curfews, and deployments of the National Guard should not affect the constitutional calculus. With the exception of small, uniform filing fees, the right to demonstrate should never be conditioned on any sort of advance payment, either in the form of peace or behavior bonds, insurance requirements, or assessments for police and clean-up expenses. A requirement of subsequent payment for police and clean-up services should be permissible; however, demonstration organizers, rather than being held personally liable for the amount, should be held only criminally liable for failing to exert a good faith effort to raise the amount from the participants.

Each of the foregoing "shoulds" should be read into the first amendment and enforced as a constitutional principle.

III. The Procedural Standards

"[I]t is just as [the substantive] issues grow more difficult and divisive," Professor Paul Freund has observed, "that the procedural injustices about which there can be readier consensus tend to become grounds of decision."[200] This phenomenon is already at work in the free speech area; one commentator has even proclaimed the existence of a distinct "first amendment due process."[201]

Although the courts have largely ignored the procedural issues raised by prior restraints on demonstrations, the few judicial stirrings have all been promising. The majority opinion in *Shuttlesworth v. City of Birmingham*[202] pointedly and gratuitously observed that the constitutionality of a permit scheme depends upon "among other things the availability of expeditious judicial review of the Commission's refusal of a permit."[203] Justice Harlan's concurring opinion also included a lengthy discussion of the need for expeditious processing of applications.[204] Both opinions stressed the relevance of *Freedman v. Maryland*,[205] the case which initiated the constitutional requirement of expeditious review procedures for film censorship rulings. Also, a number of lower courts have applied the *Freedman* principles in the demonstrations context.[206] If *Freedman* is consis-

200. P. Freund, On Law and Justice 96-97 (1968).

201. Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 518-20 (1970).

202. 394 U.S. 147 (1969).

203. 394 U.S. at 155 n.4.

204. 394 U.S. at 161-64.

205. 380 U.S. 51 (1965).

206. *See, e.g.*, Stacy v. Williams, 306 F. Supp. 963, 973 (N.D. Miss. 1969); Snyder v. Board of Trustees of Univ. of Ill., 286 F. Supp. 927, 936 (N.D. Ill. 1968);

tently so applied, and if its principles are read broadly, the forces of bureaucratic inefficiency and inertia will be realigned on the side of the protestors. That development would make the substantive reforms discussed in the preceding section seem like mere frosting on the cake.

A. *Freedman v. Maryland*

Although the substantive standards in Maryland's movie censorship scheme were very likely unconstitutional ("tend . . . to debase or corrupt morals or incite to crimes"[207]), Freedman's challenge to the Maryland law focused on the procedures of the prior restraint. Under those procedures, the exhibitor was required to submit all films before exhibition to the board of censors; no time limit for board action was set out; a film could be suppressed pendente lite for an indefinite period before any court had ruled upon it; judicial proceedings to review the censorship board's rulings had to be initiated by the exhibitor; and there was no fixed time limit for judicial disposition. Thus, in effect, a case could continue for months, with the film remaining under wraps all the while.

The petitioner's decision to attack on the procedural flank turned out to be brilliant. The Supreme Court tossed one sop to the censors —the requirement that the exhibitor had the initial obligation to submit all films for inspection was held to entail no constitutional invalidity[208]—and then invalidated all other major features of the Maryland scheme.[209] The Court then went on to prescribe the equivalent of a code of censorship procedure: (1) "the burden of proving that the film is unprotected expression must rest on the censor";[210] (2) "the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film";[211] (3) "[a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the

Hurwitt v. City of Oakland, 247 F. Supp. 995 (N.D. Cal. 1965). In addition, the commentators seem to be in agreement that the *Freedman* principles should apply to demonstration regulation. *See* Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970); Note, *Parade Ordinances and Prior Restraints*, 30 OHIO ST. L.J. 856 (1969); Note, *Parades and Protest Demonstrations: Punctual Judicial Review of Prior Restraints on First Amendment Liberties*, 45 IND. L.J. 114 (1969); *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 145-46 (1967).

207. MD. ANN. CODE art. 66A, § 6 (1957), quoted at 380 U.S. at 52 n.2.

208. 380 U.S. at 53-54.

209. 380 U.S. at 58-60.

210. 380 U.S. at 58.

211. 380 U.S. at 58-59.

status quo for the shortest fixed period compatible with sound judicial resolution";[212] (4) "the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."[213]

The Maryland scheme was so far short of the mark that the actual application of the new constitutional principles in the case at hand added nothing in the way of refinement. Subsequent Supreme Court and lower court cases have, however, clarified the picture somewhat. The "specified brief period" for administrative action has been given a quantitative gloss: fifty-seven days is too long[214] but twelve days plus an at-the-earliest-practicable-time step is permissible.[215] Pendente lite restraints prior to the first judicial determination were approved in both *Interstate Circuit Incorporated v. City of Dallas*[216] and *Universal Film Exchanges Incorporated v. City of Chicago*;[217] in the former case the restraint could have lasted as long as nineteen days,[218] in the latter, twenty-three days.[219] In *Interstate Circuit* the "prompt final judicial decision" was interpreted to refer only to the trial court's ruling;[220] apparently there is no constitutional requirement that appellate review be expedited. In *Teitel Film Corporation v. Cusack*,[221] however, the Court held that it is not enough for a scheme to provide for a prompt trial court *hearing*; provision must also be made for a judicial *decision* within a specified brief period of time.[222] In *Interstate Circuit* the Court held that the requirement of a judicial decision within nine days after the administrative classification passed constitutional muster on that point.[223]

B. *The Freedman Principles Applied to Demonstrations*

The majority in *Freedman* added a word of caution for those who would apply its principles on prior-restraint procedure in other contexts: "The requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition that films differ

212. 380 U.S. at 59.
213. 380 U.S. at 59.
214. Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968).
215. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968).
216. 390 U.S. 676 (1968).
217. 288 F. Supp. 286 (N.D. Ill. 1968).
218. 390 U.S. at 679.
219. 288 F. Supp. at 289.
220. 390 U.S. at 690 n.22.
221. 390 U.S. 139 (1968).
222. 390 U.S. at 142.
223. 390 U.S. at 690 n.22.

from other forms of expression. Similarly, we think that the nature of the motion picture industry may suggest different time limits for a judicial determination."[224] On the other hand, Justice Harlan suggested in his *Shuttlesworth* concurrence that the *Freedman* principles should apply a fortiori in the demonstrations context:

> The right to assemble peaceably to voice political protest is at least as basic as the right to exhibit a motion picture which may have some aesthetic value. Moreover, slow-moving procedures have a much more severe impact in the instant case than they had in *Freedman*. Though a movie exhibitor might suffer some financial loss if he were obliged to wait for a year or two while the administrative and judicial mills ground out a result, it is nevertheless quite likely that the public would ultimately see the film. In contrast, timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all.[225]

When a radical idea enlists the support of Justice Harlan, one is tempted to assume that surely its time has come. Nevertheless, a principle by which the Constitution begins to set docket priorities is not to be accepted lightly. A more detailed comparison of film censorship and demonstration regulation must precede any extension of the *Freedman* principles into the demonstration regulation area, especially since that comparison may vary depending on which aspect of the *Freedman* procedural code is at issue.

1. *The Burden of Proof*

Freedman placed "the burden of proving"[226]—presumably encompassing both the burden of going forward with evidence and the burden of persuasion—on the government because "the transcendant value of speech is involved"[227] and also because "[p]articularly in the case of motion pictures, it may take very little to deter exhibition in a given locality."[228] In assigning the burden of proof, the Court was especially worried about the danger of self-censorship: "The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country . . . ."[229]

224. 380 U.S. at 60-61.
225. 394 U.S. at 162-63.
226. 380 U.S. at 58.
227. Speiser v. Randall, 357 U.S. 513, 526 (1958), quoted at 380 U.S. at 58.
228. 380 U.S. at 59.
229. 380 U.S. at 59.

Neither the "transcendant value" nor the self-censorship rationale would seem to apply with much force in the context of demonstration regulation. The former appears to be an application of the familiar policy of handicapping disfavored contentions in assigning the burden of proof.[230] Not all speech regulation contentions should be formally disfavored, however. It is one thing to say that the regulatory interest in film censorship should be handicapped because it is dubious, amorphous, and quite possibly irrational, or to say that the regulatory interest in denying tax exemptions to alleged subversives should be burdened for similar reasons.[231] It is quite a different matter to burden the regulatory interest when it is concrete and undeniable, as in the case of demonstrations, and when prevailing substantive doctrine—the controlled balance—has already attempted to reflect the transcendant value of speech.

The self-censorship rationale would also seem to be inapplicable in the demonstration regulation context. There is little reason to believe that "it may take very little to deter [demonstrations] in a given locality."[232] Demonstrators probably do not, as a rule, compute marginal cost before pursuing their legal remedies. Perhaps some groups are deterred by an unwillingness or inability to pay for legal representation, by general paranoia about the court system, or by inertia; but constraints of that sort are not affected by shifting the burden of proof.

In the absence of any doctrinal help from the *Freedman* opinion, the problem of assigning the burden of going forward and the burden of persuasion can be solved by resort to two traditional principles: (1) both burdens should be placed on the party who has superior access to the relevant evidence;[233] (2) a party should not be required to prove a negative.[234] Under the substantive standards detailed above,[235] four issues of fact are likely to recur in disputes over demonstration regulation: (1) the number of people who will be seriously inconvenienced; (2) the number of people expected to participate in the demonstration; (3) whether a significant number of those expected to participate have a specific intent to engage in, or to provoke, violence; (4) whether a sufficient background of violence

230. C. McCormick, Evidence § 318, at 674 (1954).

231. Speiser v. Randall, 357 U.S. 513 (1958).

232. Freedman v. Maryland, 380 U.S. 51, 59 (1965).

233. C. McCormick, Evidence § 318, at 675 (1954).

234. *Id.*

235. *See* pts. II. A.-F. *supra.*

exists to justify prohibiting all demonstrations for the time being. On the first and fourth issues, the city should have the burden of proof because of its superior access to the relevant evidence. For the same reason, the demonstrators should have the burden on the second issue. On the other hand, the city should have the burden on the third issue—specific intent—because otherwise the demonstrators would be required to prove a negative, always a difficult task, but one bordering on the impossible in the realm of intent. While these assignments of the burden of proof follow traditional common-law principles, they should be considered constitutional requirements: the fact that the first amendment may not require more than the common law does should not mean that it cannot forbid eccentric state schemes that attempt to provide less.

2. *The Deadline for Administrative Action*

The censorship scheme in Maryland which led to the development of the *Freedman* principles provided for an administrative evaluation of all films by a board of censors. Similar provisions for administrative determination of demonstration permit requests are also possible, although, as will be discussed below,[236] they may not be constitutionally required. Whether the administrative decision is made pursuant to formal or informal procedures, it is necessary to determine whether the *Freedman* requirement of the "specified brief period" for administrative action[237] should apply to the regulation of demonstrations.

In deciding this question, it is first necessary to ask whether the principle of a definite time deadline would be desirable in the demonstration permit context and then whether the maximum permissible time lag between the filing of the permit application and final administrative action should be the same for demonstrations as it is for films.

In some respects, a definite deadline for administrative action would seem to be even more important for demonstration regulation than for film censorship. In his *Shuttlesworth* concurrence, Justice Harlan rejected the notion that the *Freedman* administrative deadline can be traced in any sense to the unique importance of the motion picture as a mode of expression; he found the demonstration "at least as basic" in terms of first amendment values.[238] Justice Harlan also pointed out that timing tends to be more important for

236. *See* text accompanying notes 273-82 *infra*.

237. 380 U.S. at 59.

238. 394 U.S. at 162.

political speech than for artistic expression, since political ideas are more often of a topical nature.[239] While the demonstration is becoming an art form in its own right, and while political films are not unknown, it is probably a fair generalization to treat demonstrations as political, and thus especially dependent upon timing. Even apart from the factor of topicality, the showing of films can frequently be delayed indefinitely without in any way affecting their content, whereas delay can often seriously undermine a demonstration—even one with an eternal message—since the participatory enthusiasm on which it is based may wane rapidly or be diverted into other channels. Timing is relevant in still another respect in that both films and demonstrations are dependent to some extent on promotional activities. Unlike the amateur advertising usually associated with demonstrations, however, film promotion is more often institutionalized and durable—the coming attractions, the radio spots, and the posters can all be saved and used at a later date. Also, films are such that they need not always be advertised contemporaneously with their exhibition: since the advertising relates to a product that will be available to the consumer over a period of time, the effect may linger in the consumer's subconscious for months. Demonstration advertising, on the other hand, must of necessity be informational rather than subliminal, and is, accordingly, much more dependent on close temporal proximity to the event. All of these considerations add up to a more elaborate explication of Justice Harlan's basic proposition that insofar as the importance of timing for the particular speech activity is determinative, the *Freedman* requirement of an administrative deadline should apply a fortiori in the context of mass demonstrations.[240]

Another factor mentioned in *Freedman* was the probability of passive acceptance of incorrect censorship rulings—a problem particularly acute in the motion picture context in light of the almost exclusively financial motivations of exhibitors and distributors,[241] and the absence of any power in the hands of the viewing public to initiate litigation on the subject. Certainly there is less danger of this type of calculated cop-out in disputes over demonstration permits, since protestors are likely to be more ideological than movie exhibitors and, for that matter, more stubborn. On the other hand, the fact that most demonstrations are so dependent on timing often produces the same result as passive acceptance, since an administrative "pocket

239. 394 U.S. at 162-63.

240. Justice Harlan stated, "The *Freedman* principle is applicable here." 394 U.S. at 162.

241. *See* text accompanying note 229 *supra*.

veto" or an eleventh-hour rejection which leaves no time for judicial review can likewise result in the effective disallowance of speech that should be protected under the prevailing substantive standards. Also, considering the institutional legal resources of the film industry and the promotional advantages that protracted, controversial litigation can sometimes entail, it is by no means clear that the forces of regulatory inefficiency and inertia have the potential to cause more of a chilling effect on films than on demonstrations. Thus, insofar as *Freedman*'s administrative deadline can be traced to a concern over this chilling effect phenomenon, it would seem to apply also in the context of demonstration regulation.

An additional dimension to the administrative deadline issue, not mentioned either in *Freedman* or in Justice Harlan's concurrence in *Shuttlesworth*, is the social cost of an incorrect rejection of a permit request. In the case of motion pictures, the cost can be calculated entirely in terms of the speech value lost thereby. Except perhaps in the case of "underground" exhibitors, defiance of censorship rulings is most improbable,[242] and even when such defiance occurs it is no more disruptive or costly than an approved showing. When a demonstration is incorrectly (in terms of the prevailing substantive standards) prohibited, on the other hand, the cost is likely to be quite high: loss of the message, further political alienation of the demonstrators, and, most important, a squandered opportunity for planning and cooperation in the event that the applicants decide to demonstrate anyway. Furthermore, outright defiance of prohibitions on demonstrations is not an uncommon phenomenon; and the outcome can be bloody. When the permit rejection is correct on the merits, such confrontations can be blamed on the demonstrators, and can be considered unavoidable if the rule of law is to be maintained. When the prohibition is *incorrect*, however, in terms of the prevailing substantive standards, the violence and the destruction—not to mention the political polarization—must be considered a cost that, in many instances, could have been avoided by streamlined procedures —including an administrative deadline. It is this factor of the social cost of procedural sloth that most clearly distinguishes film censorship from demonstration regulation, and most imperatively requires the application of the *Freedman* administrative deadline a fortiori in the latter context.

In searching for distinctions that might justify a refusal to extend

242. This is true especially in view of the city's plentiful retaliatory resources: building inspections, tax assessments, zoning restrictions, parking regulations, and the like.

the *Freedman* administrative deadline to demonstrations, an argument can be made emphasizing the relative importance of bargaining in the two regulatory situations. Films can be spliced, but only at a sacrifice in artistic integrity; negotiation and bargaining are not regular features of the film censorship process. On the other hand, major demonstrations are often preceded by weeks of negotiating and compromising over routes, schedules, and even the amenities of arrest.[243] It can be argued that a fixed deadline for administrative action may operate not unlike compulsory arbitration in that it may sap the incentive from both sides to seek earnestly a collective-bargaining solution. If city officials are denied the opportunity for extended negotiations, they may well adopt a policy to reject all controversial requests, thereby transferring the whole problem to the courts. Even if the courts should eventually rule for the demonstrators, an atmosphere of hostility may have been created in place of the cooperation and mutual planning that might have reigned had there been more time for bargaining.

This line of reasoning should be rejected, however, for two reasons. First, a deadline for administrative action need not foreclose negotiations. The parties can still bargain against the deadline for court action—hardly a strange phenomenon in civil litigation. One might even surmise that, at present, a major barrier to effective bargaining is the hope on the part of city officials that they may be able to escape with a pocket veto. Second, and more important, even if the deadline for administrative action is thought to hinder rather than help the bargaining process, it is by no means clear that the right to demonstrate should be defined by tests of will and strength. To encourage bargaining is to encourage the parties to cultivate their respective bargaining cards. For permit applicants—at least those without significant political power—the ace in the hole at the bargaining table is their relative ability and willingness to cause violence if the permit is not granted, either directly or by provoking a police reaction; for the city, on the other hand, the ace in the hole is the willingness to make life extremely unpleasant for those who demonstrate without a permit. A process that rewards these types of skills and attitudes should be viewed with some alarm. Also, bargaining should not be preferred merely on the basis of its greater flexibility, since imaginative use of equitable remedies such as the injunction can more than adequately close the flexibility gap.

The conclusion seems inescapable, then, that a definite deadline

243. *See, e.g.*, D. WALKER, RIGHTS IN CONFLICT 59-94 (1968); N. MAILER, THE ARMIES OF THE NIGHT 236-43 (1968).

for final administrative action should be a constitutional requirement for prior restraints on demonstrations. The remaining issue is what exactly should be the maximum permissible time lag between the application date and final administrative disposition. It may be that because of the complexity of the evidence relevant to the issue of competing public uses, the time limit for demonstration regulation should be longer than that for film censorship. However, the Dallas film censorship procedure approved in the *Interstate Circuit* dictum permitted a maximum time lag of twelve days with an at-the-earliest-practicable-time provision;[244] and there is nothing in the opinion to indicate that an even longer maximum time lag might not be approved. One week should be a sufficient period for administrative action on demonstration permit requests, especially if the administrative decision is entrusted to a regular government department, rather than, as is generally the case with film censorship, a special panel of private citizens who can meet only at a mutually convenient time. The extreme importance of timing[245] and the high social cost of delay in the demonstration context[246] are additional considerations which support the conclusion that any prior-restraint scheme that allows a maximum time lag of more than one week between the application date and the final administrative disposition should be found to be unconstitutional.

Moreover, even a one-week deadline would be inadequate for what is probably a sizable percentage of the permit applications—those filed less than a week before the proposed date for the event. It can be argued that no special adjustment should be made for these requests—that the threat of a pocket veto provides applicants with a healthy incentive to file early. As mentioned earlier,[247] however, many demonstrations are in direct response to rapidly developing political events, and it is precisely this species of protest that carries a high risk of spontaneous combustion if some semblance of cooperation with city officials is not established. A sensible principle to follow for such cases would be to insist that the applicants have at least one opportunity for judicial relief and that, accordingly, final administrative disposition must occur no later than twenty-four hours before the scheduled event.[248]

244. 390 U.S. at 679.

245. *See* text accompanying notes 225 & 239 *supra.*

246. *See* text accompanying note 242 *supra.*

247. *See* text accompanying note 225 *supra.*

248. Coupled with the permissible forty-eight-hour advance-filing requirement (*see* text accompanying notes 169-70 *supra*), this would always give the city at least twenty-four hours to make its administrative decision.

3. *The Burden of Initiating Judicial Proceedings*

A casual reader of the *Freedman* opinion might overlook what is probably the most important of its procedural reforms: the requirement that city officials act not only promptly, but also affirmatively. Outright denial of a license no longer suffices; the city must "either issue a license or go to court to restrain showing the film."[249] Thus, in effect, *Freedman* demands that the supposed benefits of censorship be balanced against not only the speech value of the film, but also against the value of the city attorney's time and energy—a concrete consideration that may commend itself to bureaucrats who could never be made to genuflect before "the market place of ideas." While this drain on city hall legal resources would have to be considered even if the burden of initiative were reversed and the city were forced to contemplate only a defensive posture in litigation if it rejected the application, affirmatively placing the obligation to sue on the city may make a difference, for three reasons: (1) the responsibility to take affirmative action may force city officials to do some hard thinking about priorities—thinking that would seldom germinate in normal bureaucratic routine; (2) offensive litigation may be more burdensome than defensive litigation (it takes more time and thought to draft a complaint than a general denial); and (3) the city attorney's office, which is likely to be more informed about—and probably more sympathetic to—first amendment rights, will make the final administrative decision rather than the censorship board.[250]

Once more, these policies would seem to carry over into the area of demonstration regulation. A fortiori arguments can again be made: (1) since there is a potential for violence in demonstrations, city officials, fearful of being held responsible for their decisions, are probably even more cautious in granting permits than are film censorship boards—thus there is a need for a requirement of affirmative action to counterbalance this inclination; (2) demonstrators are less likely than film exhibitors to have retained counsel who are familiar with the permit procedures—thus it may not be fair to put the burden of initiating court action on them. Also, in light of the fact that the city attorney should be familiar with the permit procedures and should have greater access to evidence than the demonstrators, he should be in a better position to assess whether litigation is likely to be worth the effort. Thus, the burden of initiating judicial proceedings in disputes over demonstration permits should be placed

249. 380 U.S. at 59.

250. Or in the case of demonstrations, the decision would be made by the parks department or the police department.

on the municipal government. This should be so even when the application is submitted less than a week in advance, so that the controlling deadline for completion of administrative action is, as discussed above,[251] twenty-four hours before the event. Then, more than ever, the city's greater familiarity with the requisite procedures makes it the proper party to initiate judicial activity.

4. *The Deadline for Judicial Action*

The conclusion that a permit scheme must set a deadline for administrative action does not necessarily resolve the companion problem of whether there must be a deadline for judicial action. It is one thing to require the police chief or the park commissioner to grant or deny a permit request within a week; it is quite another to force a state court to schedule a hearing, postpone other pending cases, hear hastily assembled evidence and hastily prepared argument, deliberate, and render a principled decision, all against a rigid deadline.

Fortunately, the problem may not be so serious as would appear at first. Preference statutes[252] and court rules[253] in many states already provide some protection against delay. Also, if the burden to seek judicial validation of the permit denial is placed on the city, that burden could be interpreted to mean that the city's failure to achieve such validation by the time of the scheduled demonstration would preclude a conviction for parading without a permit. Such a scheme, which places the penalty for court delay on the city, would probably lead to the innovative utilization by state judges of the docket-preference concept.

In *Freedman*, it will be remembered, the Court exhibited no such faith in these alternative solutions to the problem of delay. It held that a film censorship scheme must set out a fixed deadline for "final judicial decision,"[254] a requirement which it later interpreted to apply only to the trial court stage,[255] and to be satisfied by a nine-day time lag between the administrative decision and the trial court

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251. *See* text following note 247 *supra*.

252. *See, e.g.*, CAL. CIV. PROC. CODE §§ 527, 660, 1062a (West 1957). The state statutes are collected in Note, *Trial Calendar Advancement*, 6 STAN. L. REV. 323, app. II (1954).

253. *See, e.g.*, N.Y.R. CIV. PRAC. 5521 (McKinney 1963), *discussed in* 7 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE §§ 5521.01-.02 (1964). *See also* Interstate Circuit, Inc. v. City of Dallas, 249 F. Supp. 19, 25 (N.D. Tex. 1965).

254. 380 U.S. at 59.

255. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690 n.22 (1968). *See* text accompanying note 220 *supra*.

ruling.[256] One justification for the innovative *Freedman* holding may be that the pressures for early determination that typically operate in the demonstration context cannot be relied upon in film censorship cases. In film litigation, there is seldom a critical target date in advance of which a judge will want to rule, whereas in demonstration cases a judge will often set such a date either out of fairness or out of fear that unreviewed administrative recalcitrance will breed defiance. There is less incentive for judicial efficiency in the film context also because defiance of film censorship board rulings is neither so likely nor so disruptive as its counterpart in the demonstrations context. The profit-maximizing exhibitor's willingness to tolerate only so much delay before abandoning the interests of his viewing public may further explain the Court's great attentiveness in *Freedman* to the problem of judicial delay, without compelling a similar concern in demonstration cases. A final consideration may be the relative potential for abuse of the procedural reform in the two situations. Alienated demonstrators bent on "counter-harassment" tactics could have a field day with the expedited procedures, since it takes little effort to propose a demonstration and demand a permit; the price of admission to the *Freedman* film censorship procedures is a good deal higher: possession of a controversial film and a place to show it.

Nevertheless, despite the distinctions and dangers outlined above, the *Freedman* requirement of expedited judicial review should be extended to disputes concerning demonstration permits. Although there is some incentive, as detailed above,[257] for a judge to decide a case before a target date, a pass-the-buck mentality probably operates on too many occasions, especially those involving docile demonstrators. Here again, there is little to be said for a policy that encourages the cultivation of disruption potential. Furthermore, even if a judge is pressured into ruling before a target date, a fixed deadline can, depending upon the degree of cooperation evinced by the demonstrators in submitting early applications, move up the date of decision far enough to facilitate suitable planning by both the city and the demonstrators. While the judge may also take this factor into consideration, he may not feel sufficient pressure to hasten his decision. In any event, the demonstrators should know best how much advance preparation is desirable and should, accordingly, have the option to provide for that appropriate time increment after the final judicial

256. 390 U.S. at 690 n.22. *See* text accompanying note 223 *supra*.

257. *See* text accompanying notes 252-53 *supra*.

decision by submitting their permit requests a calculable period of time in advance.

Perhaps the best reason for a fixed deadline for trial court action is that in a large number of cases it may be the only way to make appellate review feasible. The local trial court judge is a member of the community; often he is elected. A distant, multimember appellate panel will generally stand a much better chance of resisting the local pressures that frequently accompany demonstration requests made by unpopular groups. If there is no deadline for judicial action and if the trial judge is hostile to the demonstrators' cause, he can preclude the possibility of appellate review by delaying his decision until the very eve of the scheduled event. While a deadline for judicial action would not totally solve this problem—in most instances the appellate tribunal would still have to be willing to advance the case on its own docket—at least it would prevent a hostile trial judge from blocking the path to a more sympathetic tribunal.

Furthermore, if trial court hostility (or at least constitutional myopia) is in fact a serious problem, perhaps there is a need to reexamine the *Interstate Circuit* dictum which states that *Freedman's* "prompt final decision" refers only to the trial court ruling.[258] On the other hand, expedited appellate review can mean burdensome travel arrangements and the shuffling of precious docket resources. It can also be argued that the process of expedition must end somewhere, and that one "day in court" would seem to be an adequate allowance for those seeking preferred treatment. Moreover, the need for unhurried deliberation, for "neutral principles," and for judicial "craftsmanship," might be said to be stronger at the appellate level. The spectre of a systematic harassment of the court system by would-be demonstrators might also be raised—this time with a more compelling parade of horrors. Furthermore, a discretionary docket-advancement provision in the appellate court rules, such as existed in *Shuttlesworth*,[259] may be a sufficient vehicle for expedited appellate review: if the trial court denial is truly arbitrary and if the appellate court is truly sympathetic, the docket advancement can be achieved without a deadline on appellate review; compulsory expedited review is likely to accomplish little more and is sure to breed resentment among appellate judges. While the danger of trial court inadequacy is not to be underestimated, these competing considerations should prevail: the statement in *Interstate Circuit* that the ex-

258. 390 U.S. at 690 n.22. *See* text accompanying note 220 *supra*.

259. ALA. CODE, tit. 7 app., SUP. CT. R. 47 (1960), *cited in* Walker v. City of Birmingham, 388 U.S. 307, 319 (1967).

peditious-review requirement applies only to the trial court ruling should govern as well for the regulation of demonstrations, subject to the caveat that the scheme must include a provision for *discretionary* docket advancement at the appellate court level.

On the question of the maximum permissible time lag between the filing by the city of the suit for validation of a permit denial and the trial court decision on that question, the nine days approved in *Interstate Circuit* would seem to be too long. Since demonstrations are so frequently keyed to a specific target date, and since the violence-potential element makes it imperative that the legal system be promptly responsive to permit requests, the maximum permissible time period for judicial action should be one week. When coupled with the one-week time period for administrative action, that leaves a time span of as much as two weeks between the filing of the permit application and the trial court decision—a length of time already bordering on the unrealistic for demonstrators operating in a turbulent political world.

Two other problems regarding the deadline for judicial action are worthy of mention. First, what happens when the application is filed so late as to make the one-week judicial deadline irrelevant?[260] If, for example, an application is submitted three days before the event and the city sues to validate a denial twenty-four hours before the time scheduled for the demonstration, must the statutory scheme require the trial court to reach a decision within the remaining twenty-four hours? Or, if the application is filed thirteen days in advance of the proposed event, and the city goes to court, as required, with six days remaining, can the trial judge simply let the target date pass without doing anything? As was true for the administrative deadline, a refusal to provide special treatment in these time-pressure cases can be defended as creating an incentive for early planning and filing—assuming that the risk of judicial inaction is to be borne by the demonstrators.[261] That incentive, plus the interest in a relatively orderly functioning of the courts, must be weighed against the benefits that might accrue in having a special judicial deadline for time-pressure cases. Those advantages, however, are few: the likelihood is de minimis that an emergency trial court deadline would make appellate review feasible; in any event there would not be enough time after the final decision for careful, detailed planning;[262] and a trial judge who would use a "pocket veto"

260. *See* text accompanying note 251 *supra.*

261. *See* text accompanying note 257 *supra.*

262. The opportunity for such planning provided one rationale that supported the standard judicial deadline.

in the absence of a special deadline is unlikely to rule for the demonstrators, especially if the time pressure is such that he is not fearful of appellate review. Accordingly, when time is so short that the one-week judicial deadline would be inapplicable, there should be no first amendment requirement that an emergency deadline for judicial review be instituted.

The remaining constitutional problem concerns a possible alternative system of administrative and judicial deadlines keyed not to the number of days after filing, but rather to the number of days before the scheduled event. Thus, a permit ordinance might provide that, no matter how early the protesters apply, the final administrative decision must come at least two weeks before the proposed date for the demonstration, and the final trial court decision must come, for example, four days before that date. Such a scheme should not satisfy the requirements of the first amendment. Some protest groups may feel that it is very important to get a trial court decision on their application several weeks before the proposed event in order to make feasible elaborate planning or promotional activities, or to leave enough time for unhurried appellate litigation. Courts should of course uphold reasonable advance-filing *maximums* in order to guard against unseemly squatters' contests for scarce or distinctive sites and times; but within the rather lengthy time periods remaining after that consideration is taken into account, applicants should be entitled to advance through the administrative and trial court stages in two weeks, and to proceed with detailed planning or appellate litigation, as the case may be.

Thus, a thorough comparison of film censorship and demonstration regulation serves to substantiate the preliminary observations made in *Shuttlesworth* that prior restraints on demonstrations should be governed by the principles of *Freedman v. Maryland.* A final argument against the extension of *Freedman* might center on the Court's failure in that case, and in *Shuttlesworth*, to consider the existing alternative of injunctive relief in the federal courts under 42 U.S.C. § 1983.[263] What justification, it may be asked, can there be for a novel and intricate intrusion by the first amendment into the tranquil domain of state court procedures when the rights of assembly are in no way dependent on those procedures? The justification

263. 42 U.S.C. § 1983 (1964) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

might lie in the several potential obstacles to federal relief: the federal district judge may insist on an exhaustion of local administrative remedies, even in the absence of an administrative deadline and in the face of official delay; he may abstain; or he may sit hundreds of miles away. In any event, the federal alternative places the burden of initiating judicial proceedings on the demonstrators, and, as explained above,[264] the shifting of that burden is probably the most significant of the *Freedman* principles. Accordingly, the contention should not be accepted that the *Freedman* reforms are unnecessary in light of the existing federal remedies. The Supreme Court should fulfill the promise of *Shuttlesworth* and insist that prior restraints on demonstrations satisfy the procedural requirements outlined in *Freedman v. Maryland.*

C. *Appellate Review of Fact-Finding*

The Court in *Freedman* did not presume to answer all procedural questions which may arise in the prior-restraint context. One important procedural aspect with which *Freedman* did not deal is appellate review of fact-finding.

It is a common practice in several kinds of first amendment cases —libel,[265] obscenity,[266] contempt of court by publication,[267] unlawful advocacy[268]—for the Supreme Court to undertake an independent examination of the record and to reach its own factual conclusions. *Edwards v. South Carolina*[269] and *Cox v. Louisiana*[270] established the propriety of appellate fact-finding in mass assembly cases: "In the area of First Amendment freedoms as well as areas involving other constitutionally protected rights, 'we cannot avoid our responsibilities by permitting ourselves to be "completely bound by state court determination of any issue essential to decision of a claim of federal right . . . ." ' "[271] The majority opinions in *Edwards* and *Cox* contain generous excerpts from the trial transcripts, but in neither case did the Court specifically overturn a formal lower court finding on an

264. *See* text accompanying notes 249-51 *supra.*

265. New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

266. Jacobellis v. Ohio, 378 U.S. 184, 187-90 (1964).

267. Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

268. Fiske v. Kansas, 274 U.S. 380, 385-86 (1927).

269. 372 U.S. 229, 235 (1963).

270. 379 U.S. 536, 545 n.8 (1965). *See also* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 509 (1969).

271. Haynes v. Washington, 373 U.S. 503, 515-16 (1963), quoted at 379 U.S. at 545 n.8.

issue of primary fact. Furthermore, the Court's disclaimer related only to being "completely bound."

In attempting to prevent extension of the practice of appellate fact-finding to disputes concerning demonstration permit denials and injunctions, it might be argued that since factual disputes are likely to be complicated and time pressures are likely to be great, appellate fact-finding is an empirical luxury that the judicial system simply cannot afford. It might also be contended that *Edwards* and *Cox* were wrongly decided on this point in the first place. Furthermore, it might be argued that the analogy to other free speech cases is faulty because trial court expertise can be important in resolving the factual disputes which arise out of demonstrations, whereas an appellate court is likely to be just as good as a trial court at reading incendiary pamphlets and scandal sheets and watching dirty movies.

A number of additional considerations suggest, however, that the practice of appellate fact-finding in mass assembly cases is both desirable and applicable a fortiori in the prior-restraint context. The complexity of the factual determinations in mass-assembly cases makes appellate review especially important, since the temptation must be great for a trial judge—especially one working under enormous time pressures—to defer excessively to the judgment of the city's "experts."[272] The municipal judge may be under additional pressure when those experts are likely to construe a rejection of their specialized judgment as an insult to their competence or integrity; municipal harmony may thus be a hidden issue. The complexity of the competing-use determination and the impossibility of resolving it by per se rules also make it desirable for the trial judge to be as articulate and specific as possible in setting out his factual conclusions; nothing is likely to encourage this specificity as much as the threat of appellate reversal.

Moreover, permit denials and injunctions are *prior* restraints and, as such, the "facts" are not actual events, but merely estimates. The danger that the subjective values of the decision-maker will color the fact-finding process is especially great; thus, the need for an appellate check is unusually strong. Also, because the crucial disputes will concern estimates by competing "experts," the demeanor and credibility of the witnesses will not be so important as their qualifications, their logic, and their proof; thus, the "dry record" will be a more adequate basis for appellate review than is usually the case. Finally, and probably most important, fact-finding before the event places

272. *See* text following note 281 *infra*, and text accompanying notes 282-84 *infra*.

enormous pressures on the decision-maker to err on the side of regulation, since he is likely to be blamed if the demonstration is approved and subsequently turns out to be more inconvenient or destructive than expected. Appellate fact-finding may suffer less from this cautionary bias.

These pressures of complexity, subjectivity, and fear of blame operate on appellate judges as well, but it is probably a fair generalization to say that their relative remoteness from local political pressures, their collective decision-making processes, and their somewhat more detached perspectives are likely to produce better results in enough cases to justify the added litigation costs of appellate fact-finding. Lest it be thought, however, that those same institutional qualities may lead to unrealistic, "academic" judgments, it is also safe to predict that appellate courts will still pay great deference to lower court findings and will exercise their fact-finding powers only in extreme cases.

D. *The Requirement of an Administrative Hearing*

There is another important procedural question with which *Freedman* did not deal. As mentioned previously,[273] the prior-restraint scheme in *Freedman* provided for an administrative hearing, so the Court was not forced in that case to decide whether such a formal hearing is constitutionally required. The issue is important because few demonstration permit systems provide for a formal administrative hearing.

In upholding the permit scheme in *Cox v. New Hampshire*,[274] the Supreme Court emphasized the procedural protections afforded applicants at the administrative stage: "uniformity of method of treatment upon the facts of each application";[275] a "systematic, consistent and just order of treatment";[276] and "a required investigation."[277] The Court has held that the Constitution requires administrative hearings of some sort (not necessarily "trial-type") in bar admission[278] and welfare termination disputes;[279] lower courts have

273. *See* text following note 207 *supra*.

274. 312 U.S. 569 (1941).

275. State v. Cox, 91 N.H. 137, 143, 16 A.2d 508, 513 (1940), quoted at 312 U.S. at 576.

276. State v. Cox, 91 N.H. 137, 143, 16 A.2d 508, 513 (1940), quoted at 312 U.S. at 576.

277. State v. Cox, 91 N.H. 137, 146, 16 A.2d 508, 513 (1940), quoted at 312 U.S. at 576.

278. Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963).

279. Goldberg v. Kelly, 397 U.S. 254 (1970).

applied the requirement to college disciplinary actions.[280] While the general principle is that de novo judicial review (as would exist for demonstration permit disputes under the procedures advocated above) precludes any due process objection to administrative proceedings,[281] it can be argued that "first amendment due process" (the "preferred procedural position") should not be so easily satisfied—that permit applicants should be constitutionally entitled to a full and fair hearing at each and every stage of the proceedings.

Several policy considerations might be marshalled in support of such a contention. First, it can be argued that a hearing, because it brings the factual issues more rapidly into focus, is likely to improve the chances that the city will grant the permit without a court fight —assuming, as seems plausible, that without a hearing the city will generally resolve factual uncertainties in favor of rejecting the application. If a permit is to be issued eventually, it is preferable that the granting of the permit be done voluntarily by city officials in the first instance—not only because this saves time, judicial resources, and litigation expenses, but also because such official cooperation is likely to increase community tolerance, and to facilitate communication and planning between protestors and city officials. Moreover, the time element is important to impartial decision-making is another respect: even though, as a rule, judges are more likely than bureaucrats to recognize legitimate speech interests, this may not be true when the bureaucrat has a week to explore the situation and the judge has only twenty-four hours or less. Also, as Professor Davis has argued, de novo judicial review may be a false muse "when the court is strongly influenced by the agency's view, or when despite the theoretical scope of review the court limits its inquiry to reasonableness."[282] Furthermore, even if the administrative hearing does not result in a permit being voluntarily granted, it may substantially improve any subsequent judicial proceedings, especially if time pressure is great at the latter stage: the litigants will have already amassed their evidence; they will be much better informed about each others' contentions; and an administrative record, or at least administrative findings, will be available to the judge so he can focus his inquiry on the key points of dispute.

There are some respects, however, in which an administrative

280. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd.*, 418 F.2d 163 (7th Cir. 1969). *See generally* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

281. 1 K. DAVIS, ADMINISTRATIVE LAW § 7.10 (1958).

282. *Id.* § 7.10, at 451.

hearing may work to the detriment of the speech interest—a happenstance that does not necessarily cast aspersions on the desirability of such a hearing, but which certainly undercuts the argument that it is required as a matter of "first amendment due process." First, there is reason to believe that city officials will be more accommodating to unpopular groups when the decisions of those officials are at a level of "low visibility"—that is, when their affirmation of first amendment rights need not be held up to the glaring light of voter backlash, or when there is less opportunity for them to grandstand in rejecting the filthy traitors. Second, even if the one-week administrative deadline would be feasible, a hearing requirement would cause some needless delays within that period, particularly in those instances in which the city officials have firmly decided not to grant the permit. There is nothing magic about a one-week time period; if a hopelessly deadlocked dispute can be shifted to the courts in two days, all the better. Third, the more the administrative determination resembles a court proceeding, the more judges may be tempted to defer to the administrative judgment, albeit informally or subconsciously.

The above considerations serve only to devalue the pro-speech side of the issue. On the pro-regulatory side must be included the time drain on busy city officials, the scheduling and procedure-formulating headaches, and the potential for "counter-harassment." On the whole, it would seem that the desirability of a hearing is a matter of sufficient ambivalence that the first amendment, as procedurally sensitized as it ought to be, should adopt a stance of benign neglect toward the question.

If, however, a city should provide for a comprehensive administrative hearing, de novo judicial review of such a hearing should be a constitutional requirement. Whether or not the ghost of *Crowell v. Benson*[283] still walks such that de novo review is necessary for all "jurisdictional" and "constitutional" facts,[284] in the context of demonstration regulation there are special reasons for insisting on completely independent judicial fact-finding, including the making of a fresh record. First, because of the time pressure, the administrative record may be incomplete; new evidence and arguments based thereon may come to light with each passing day. Also, disputes in this area are frequently so controversial and so much in the public eye that administrative bias is likely to be a serious problem no matter how nonpartisan the panel and how elaborate the procedural

283. 285 U.S. 22 (1932). *See* Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 U. PA. L. REV. 163 (1949).

284. 4 K. DAVIS, ADMINISTRATIVE LAW §§ 29.08-.09 (1958).

safeguards. Community pressure may result not only in a distorted administrative record, but also in an excessive willingness by the reviewing judge to defer to that record, even when the formal standard for review is "independent." Unwarranted judicial deference to administrative findings is to be feared also because of the time pressure. A de novo standard cannot eliminate all of these temptations, but a judge is less likely to fall prey to those temptations if he is forced to listen to the evidence afresh.

E. *Self-Help*

The common law has long recognized that the most expeditious "procedure" of all, self-help, may sometimes also be the most efficacious. No matter how many deadlines are instituted and how many burdens are shifted, permit applicants frequently will find themselves empty-handed when the appointed hour for the demonstration arrives. What then? May they take to the streets and claim their asserted constitutional rights, at the risk of criminal punishment if their claim is ultimately rejected? Or can the legal system, having made every effort to process their claims in advance, demand of the demonstrators an abandonment or postponement of their constitutional entitlements? If self-help can somehow be made a workable recourse in the explosive context of mass demonstrations, "judicialization" can be greatly enhanced: the substantive issues can be explored after the fact, under normal time pressures, and with more carefully gathered evidence and the benefit of hindsight; the "highest possible decision-maker" can become, in practice, the United States Supreme Court.

Consider the following cases. *A* refuses to apply for a permit; he undertakes a march that could have been prohibited in the first place; he is prosecuted for parading without a permit under a statute that is defective for overbreadth. *B* applies for a permit; he is rudely rebuffed by a city official in clear violation of the state permit statute (which is not invalid on its face); he marches anyway in a manner that would be protected by the first amendment; he is prosecuted for parading without a permit. *C* applies for a permit; he is rudely rebuffed; he notifies city officials that he will march anyway; the officials obtain an injunction against the march; the injunction is overbroad and is also based on a state statute that is overbroad; *C* marches in a manner ordinarily within his constitutional rights; he is prosecuted for contempt. Under the law as it now stands, *A* wins, but *B* and *C* lose!

It has always been true that regulations which are invalid on their

face may be violated with impunity. Long before the civil liberties revolution, that doctrine had been applied for the benefit of cigarette vendors,[285] contract carriers,[286] and private detectives.[287] In *Lovell v. Griffin*,[288] a Jehovah's Witness convicted of distributing pamphlets without a permit was allowed to challenge the constitutionality of the ordinance under which she was prosecuted, even though she had never applied for a permit. Since *Lovell*, defendants have successfully raised the contention that a statute is invalid on its face after disobeying permit requirements dealing with handbills,[289] labor union solicitation,[290] and film exhibition.[291] *Shuttlesworth v. City of Birmingham*[292] recently applied the principle—rather mechanically and over Justice Harlan's reservations[293]—in the context of mass demonstrations. In attempting to justify the doctrine, the Supreme Court has never gone beyond Blackstonian metaphysics: "[t]he statutes were as though they did not exist."[294]

Quite a different principle governs when a regulatory scheme is valid on its face but has been unconstitutionally applied to deny a permit to a deserving applicant. The Supreme Court held in *Poulos v. New Hampshire*[295] that such a thwarted applicant must raise his constitutional contention in a separate injunction or mandamus proceeding, *before* he violates the statute. The case may very well stand for the broad proposition that an unlawful permit refusal may never be tested by demonstrating without the permit. A narrower reading of *Poulos* is possible, however, because in that case there was an unusually long lead time—six weeks—between the refusal of the permit and the scheduled mass meeting—more than enough time to bring a mandamus or injunction action and perhaps even one appeal therefrom. Thus, it is not clear whether the absolute duty to obey the permit denial ends once the applicant has made every effort to gain anticipatory relief, or whether, if he has not succeeded in winning judicial relief by the time of the scheduled activity, he may

285. Gundling v. Chicago, 177 U.S. 183 (1900).
286. Smith v. Cahoon, 283 U.S. 553 (1931).
287. Lehon v. City of Atlanta, 242 U.S. 53 (1916).
288. 303 U.S. 444 (1938).
289. Schneider v. Town of Irvington, 308 U.S. 147 (1939).
290. Staub v. City of Baxley, 355 U.S. 313 (1958).
291. Freedman v. Maryland, 380 U.S. 51 (1965).
292. 394 U.S. 147 (1969).
293. 394 U.S. at 159-64 (Justice Harlan, concurring).
294. Poulos v. New Hampshire, 345 U.S. 395, 414 (1953).
295. 345 U.S. 395 (1953).

proceed without a permit and raise his contentions later in defense to a criminal prosecution.

In *Walker v. City of Birmingham*[296] the Supreme Court was forced to decide whether an overly broad injunction based on an overly broad statute[297] was governed by *Lovell* or *Poulos*. The *Poulos* principle won out, even though the lead time between the issuance of the injunctions and the scheduled march in *Walker* was only two days, and even though appellate review of the injunction could be had within that time only in the discretion of the court. Relying on labor cases that dealt with temporary restraining orders designed to preserve the status quo pending litigation,[298] the Court held that an injunction—even an injunction changing the position of the parties with no further litigation pending—must always be obeyed, with two possible exceptions: if it is "transparently invalid,"[299] or if "petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims."[300] *Poulos* was cited with gusto; *Lovell* and Blackstone (Does an invalid injunction "exist"? Even if it is based on an invalid statute?) were ignored.

In defending the Court's present distinction between challenges to permit statutes invalid on their face and challenges to permit refusals under concededly valid statutes, one might argue that statutes invalid on their face are more harmful to speech in that they "chill" everyone's right of expression, not just the right of a single rebuffed applicant, and also that such statutes are more likely to be symptomatic of a discriminatory pattern of enforcement, whereas a single improper—even discriminatory—refusal may be aberrational. On the other hand, it is a daring behavioral assertion to claim that administrative action arguably within the confines of an overbroad statute is likely to "chill" expression by laymen more than is similar action seemingly in violation of a narrow statute; the latter conduct would seem to indicate more official recalcitrance and hostility, and any "chilling" is likely to come from word-of-mouth or newspaper knowledge that a given demonstration was rejected, rather than from an abstract reading of the statutes.

If the two situations can be distinguished, the distinction should

296. 388 U.S. 307 (1967).

297. BIRMINGHAM, ALA., CODE § 1159 (1944), the identical statute which was also at issue in *Shuttlesworth*. *See* text accompanying note 20 *supra*.

298. *E.g.*, Howat v. Kansas, 258 U.S. 181 (1922), discussed in *Walker* at 388 U.S. at 313-14; *In re* Green, 369 U.S. 689 (1962), discussed in *Walker* at 388 U.S. at 315 n.6.

299. 388 U.S. at 315.

300. 388 U.S. at 318.

cut the other way. When the constitutional challenge is to the statute on its face, there is little to be gained by waiting to see the event unfurl; when the issue is a particular permit refusal, on the other hand, hindsight can be invaluable in judging the fairness of that refusal. Also, since any defendant can challenge a statute on its face, the *Lovell* doctrine sometimes results in the acquittal of persons who could have been denied a permit even under a narrowly drawn statute; and these are precisely the demonstrators who are most likely to cause serious public disorder, rather than those who win acquittal only because they were by right entitled to a permit in the first place. Actually, these inversions should serve only to illustrate the weakness of the Court's present distinction. The best course would be to make no distinction at all.

Injunctions are a different story. *Near v. Minnesota*[301] to the contrary notwithstanding, injunctions do not have the same repressive features exhibited by classic prior restraints such as licensing. When speech is regulated by injunction, the burden of initiative is on the censor (as it would be under the reformed procedures advocated above); there is less ambiguity about who is covered; and the original decision is made by a judge after an adversary proceeding. Conceivably, too, there is less of a chilling effect, since laymen may well consider injunctions to be sui generis. From the law-enforcement side of the equation, there is something to be said for giving injunctions special status: a uniform absolute duty to obey—that is, to abandon constitutional contentions when time does not permit final judicial disposition in the form of Supreme Court review or certiorari denial—may be too rigid and may not command respect, but a selective injunctive duty, if not squandered, may retain some moral force.

Thus, *Walker* is not necessarily a bad decision: it may or may not be, depending on whether the two exceptions—"transparently invalid" and "delay or frustration"—are interpreted broadly enough to make the "duty to obey" a truly selective obligation, to be operative only when, on balance, the dangers of self-help exceed the correlative "judicialization" advantages.[302] The balance will vary somewhat in the two regulatory contexts—injunction and the streamlined permit process outlined above[303]—and the self-help rules should reflect that variance. As suggested above, however, no differ-

301. 283 U.S. 697 (1931).

302. Such a determination need not be made, however, on an ad hoc basis but can be formulated in per se rules.

303. *See* pts. III. B.-D. *supra.*

entiation should be made on the basis of whether the constitutional challenge is to the permit scheme on its face or to a specific permit denial under a facially valid scheme.

First of all, there should be a general presumption, in both the injunction and permit application contexts, against self-help. Even when it is deemed to be a proper remedy—proper in the sense that parties who ultimately prevail on the merits are not penalized for having taken extra-legal action—self-help contains an element of defiance. While this defiance may be carefully calculated and tempered in the minds of the group's leaders and lawyers, it is by no means certain that the spirit of moderation will filter down to the masses, or that police and bystanders will peaceably acknowledge the contextual propriety of the self-help remedy. Moreover, self-help may take the city by surprise, causing a panicky response or extra inconvenience to other citizens because of inadequate policing of the event. These reasons for the apprehension that self-help may have unfortunate consequences take on special significance when large numbers of demonstrators are involved. Thus, as a general principle, cities should be able to require that protesters challenge permit requirements and injunctions through the established anticipatory channels —permit application, declaratory judgment, mandamus, motion to vacate, and the like—and cities should be further allowed to treat the failure to exhaust those anticipatory channels as a waiver of constitutional rights in a subsequent criminal proceeding.

There are at least four situations, however, for which anticipatory litigation is not a satisfactory answer. First, the very right asserted may be freedom from *any* prior restraint, as when a speaker contends not that he is entitled to a permit, but rather that he is entitled to speak without one. Second, the speaker may be unaware of the permit requirement or unsure about whether it extends to the particular activity he has planned. Third, the need for expression may be so immediate that it allows no time to secure a permit, as was the case for the truly spontaneous demonstrations following the assassination of Martin Luther King and the intervention in Cambodia. Fourth, the demonstrators may diligently pursue all available advance remedies and still be left on the eve of the planned demonstration with neither vindication nor a final determination (Supreme Court disposition) of their rights.

While it is true that the dangers associated with self-help are present in these situations as well, there are also strong countervailing factors that must be considered. First, it would be unfair to derive any support from the concept of waiver when the failure to achieve

final adjudication in advance of the resort to self-help can in no way be ascribed to any procedural culpability on the part of the protestors. Also, when the demonstrators' decision to engage in self-help is made only out of necessity, there may be no defiance mentality at work; the risk of violence may actually be greater should the city attempt to enforce the prohibition on self-help rather than allow the demonstrators to proceed. Furthermore, a selective legitimation of self-help in response to these considerations would not amount to an abandonment of all checks on self-help, since normal criminal prohibitions would still be operative. The city would lose only two options: (1) to punish otherwise lawful behavior because it is done without a permit, or in violation of the terms of an injunction; (2) to engage in multiple charging—perhaps gaining plea-bargaining leverage[304]—by adding a count of parading without a permit or contempt to other counts of disorderly conduct, obstructing public passageways, unlawful assembly, trespass, and the like. At the very least, these additional factors suggest that the general rule against self-help should not be mechanically applied in the four enumerated fact situations. Rather, in those instances, the self-help issue must be resolved by a more detailed analysis.

1. *Speech That Cannot Be Subjected to a Prior Restraint*

The first situation is that of the speaker who claims that his activity cannot be subjected to *any* kind of prior restraint—perhaps a nonamplified speech in a large park would fall into this category.[305] In the context of a prosecution for speaking without a permit, this constitutional contention should be heard even if the defendant never bothered to apply for a permit or to challenge the permit requirement in advance, for if he is successful, the defendant will have shown that he had a constitutional right to do exactly what he did: speak without a permit. On the other hand, if the court concludes that the particular activity may properly be subjected to a permit requirement, but that in the immediate instance the speaker would have been entitled to a permit had he applied, the speaker's failure to utilize advance channels would be fatal to his defense.

The problem is more difficult in the injunction context. It is by no means clear that there is *any* activity that can claim absolute immunity from injunctive regulation—even the nonamplified speech in the park might be constitutionally enjoined during an on-

304. *See generally* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

305. *See, e.g.*, Thomas v. Collins, 323 U.S. 516 (1945).

going riot or upon proof that the speaker specifically intends to engage in violence. Most analogous to the situation in which a speaker claims immunity from any prior restraint is when an injunction is issued for obviously unconstitutional reasons[306] and when an injunction is issued to enforce a permit requirement against an activity that cannot constitutionally be subjected to such a requirement. For those two kinds of injunctions, it may already be the law—in light of *Walker v. City of Birmingham*[307] and a 1945 case, *Thomas v. Collins*[308]—that a resort to self-help in the face of an injunction without any attempt to seek advance relief does not preclude raising first amendment contentions in subsequent contempt proceedings.

In *Walker*, it will be remembered, the Court qualified its proscription of self-help with the following observation: "Without question the state court that issued the injunction had, as a court of equity, jurisdiction over the petitioners and over the subject matter of the controversy. And this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity."[309] It is still unclear whether this language represents merely a makeweight argument or a careful delineation of doctrine. In this regard, it is perhaps noteworthy that subsequent cases have indicated that the *Walker* injunction was in fact unconstitutional in at least two respects—it was based on a statute invalid on its face[310] and it was issued ex parte[311]—and yet those very cases have cited *Walker* without the slightest suggestion that it was decided wrongly on its facts.

In *Thomas* the defendant was served with a temporary restraining order just six hours before he was due to mount the hustings for a scheduled speech. He flouted the order, was cited for contempt, and won reversal from the Supreme Court upon successfully contending that his speech could not, under the first amendment, be subjected to the slightest prior restraint—not even a pro forma registration requirement. The majority in *Poulos* distinguished *Thomas* by mistakenly claiming that the entire registration scheme had been declared unconstitutional on its face[312] but the *Thomas* court explicitly

306. Under the substantive standards advocated in this Article (*see* pts. II. B.-E. *supra*), an obviously unconstitutional injunction would be based either on the content of the proposed speech, the fear of a hostile audience, or the past conduct of the speaker.

307. 388 U.S. 307 (1967).

308. 323 U.S. 516 (1945).

309. 388 U.S. at 315.

310. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51, 153 (1969).

311. Carroll v. President & Commrs., 393 U.S. 175, 180 (1968).

312. 345 U.S. at 413-14. It should be noted that this placed the case within the confines of the *Lovell* doctrine.

disavowed such a holding at two different places in the opinion.[313] Thus, either *Thomas* has been obliquely overruled by *Poulos*, or *Thomas* stands for one, or both, of two propositions: (1) injunctions enforcing permit or registration requirements against activities that are constitutionally immune from such prior restraints may be challenged by means of self-help without the necessity of resorting to any available advance remedies; (2) whenever time does not allow for an adequate advance remedy, self-help is a proper means of challenging an injunction on first amendment grounds. This latter proposition is relevant to the fourth enumerated fact situation (the failure to achieve final disposition by the time set for the event) discussed below[314]—but the former proposition, if it is in fact the correct reading of *Thomas*, would clearly make that case important authority for the first fact situation, now under consideration.

Given, then, this unseemly tangle of cryptic precedents, what *should* the law be? A number of arguments can be made for the contention that the duty to challenge an injunction in advance of the planned event should be absolute—at least when time permits such an advance challenge—and that any exceptions to this duty that might be extrapolated from the *Walker* and *Thomas* opinions ought to be nipped in the bud. It is always desirable that legal obligations be unambiguous and unequivocal, but these features are especially important when political passions run high, and when the legal obligation in question lacks such other legitimating supports as conception in the abstract, legislative approval, and general applicability. Once more, self-help raises the risk of violence—city officials are likely to be blind to the transparent invalidity of the injunction and can be expected to enforce it; an appellate court in vacating the injunction can avert the risk of violence and can sometimes achieve last-minute cooperation between demonstrators and city officials. It might also be hypothesized that the quantitative advantages of any exceptions for "transparency," "frivolity," or whatever, are likely to be too insignificant to justify sacrificing the clarity and moral force of an absolute duty: no doubt many judges issue unconstitutional injunctions, but how often are *transparently* invalid injunctions granted? Moreover, from the standpoint of judicial economy, there is much to be said for avoiding the necessity for two-dimensional constitutional line-drawing: What is invalid? What is transparently invalid? Finally, in situations like that presented in *Thomas*, it makes sense to give the city an incentive to enforce its permit system by obtaining an in-

313. 323 U.S. at 532-33, 541-42.

314. *See* text accompanying notes 331-49 *infra*.

junction in advance rather than by simply lying in wait for the demonstrators and arresting them for speaking or marching without a permit. In this regard, an anticipatory injunction puts the demonstrators on notice that their proposed event is, at least in the minds of the city and the issuing judge, subject to the permit requirement. Also, the city's injunction request may be denied on the ground that the event cannot be subjected to the permit requirement, and it is better for all concerned that such a judicial determination come before the event, rather than after the demonstration has been aborted, the demonstrators arrested, and the community subjected to whatever violence and disruption may ensue in the process.

Against these several considerations, it is difficult to imagine any countervailing arguments that would justify an exception to the absolute duty to make an advance challenge to all injunctions, no matter how obviously invalid, so long as time permits. Perhaps the ghost of Blackstone, however, would explain that a transparently invalid injunction does not exist, whereas a merely invalid injunction, being nontransparent, must be real.

2. *Ignorance of the Prior Restraint*

The second situation—in which the protestors are unaware of the prior restraint or unsure of its scope—arises primarily in the context of prosecutions for speaking without a permit, since most jurisdictions make actual notice of an injunction a prerequisite to a conviction for contempt. While no court appears to have addressed itself directly to the question whether the first amendment requires a general alteration in the normal criminal or equitable rules regarding notice, the Supreme Court has grappled with a number of related problems.

In *Lambert v. California*,[315] a Los Angeles ordinance making it unlawful for a convicted felon to remain in the city for more than five days without registering was held to be violative of due process "where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge."[316] The Court was careful, however, to stress the unique features of the ordinance in question and thus squelched any implication that ignorance of the law will always be a constitutional defense in prosecution for failure to comply with a registration or permit statute: "Violation of its provisions is unaccompanied by any

315. 355 U.S. 225 (1957).

316. 355 U.S. at 227.

activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking."[317] While *Lambert* thus cannot be read as an across-the-board limitation on strict liability and constructive notice, it can be argued that the rather demanding standard of notice applied in the case may also be a proper one when first amendment interests are at stake. Such a contention would find support in *Smith v. California*,[318] in which the Court held that *some* element of scienter is constitutionally required to convict booksellers for possession of obscene literature. Although *Smith* dealt with ignorance of facts rather than of law,[319] and although the holding was based on the phenomenon of self-censorship[320]—a phenomenon which may function differently when the strict liability relates to ignorance of the law—the case is nonetheless important for the general proposition that a more demanding mens rea requirement may be one element of the burgeoning concept of "first amendment due process."

While *Lambert* and *Smith* can only be regarded as faint probes, at least on the notice issue with respect to prior restraints on demontrations, one of the Court's holdings in *Cox v. Louisiana*[321] has a more definite thrust. The defendant in *Cox* was convicted under a statute that prohibited picketing "near" a courthouse.[322] It was uncontested that he had picketed approximately 125 feet from the courthouse, but the Court held that the defendant's "mistake of law" was exculpatory as a matter of due process (with no special reliance on the first amendment) because he had been misled by city officials on the scene who had, at least in the Court's reading of the record,[323] given him permission to picket where he did. Thus, a violation committed on the basis of a mistake of law induced by city officials was held to amount to no violation at all.

This background of case precedent offers a good starting point for a more comprehensive approach to the problem of mistake of law as it relates to self-help. First, on the special problem of a mistake of law induced by city officials, the *Cox* holding is clearly correct, at least if one accepts the Court's reading of the record. There are a

317. 355 U.S. at 229.
318. 361 U.S. 147 (1959).
319. 361 U.S. at 149.
320. 361 U.S. at 154.
321. 379 U.S. 559 (1965).
322. LA. REV. STAT. § 14:401 (Supp. 1962), quoted at 379 U.S. at 560.
323. 379 U.S. at 569.

number of general reasons for a separate rule when government officials have induced the mistake on the part of the demonstrators: the absence of blameworthiness on the part of the demonstrators; the desirability of giving city officials an incentive to know what they are talking about; the de minimis danger—serious in other mistake-of-law cases—that demonstrators may intentionally preserve their ignorance of the law if it works to their legal advantage. Moreover, a separate approach to these cases is particularly essential in the context of prior restraints on demonstrations for two reasons: (1) in an atmosphere of charged emotions, a broken promise or change of position by the city is likely to be especially dangerous and should, accordingly, be discouraged by a strong "estoppel" doctrine; and (2) protestors should be given every incentive to consult city hall in advance—including the hope of winning binding concessions—and should be freed from every disincentive—including the possibility of being "entrapped" by a mistaken interpretation of the law. Indeed, the best course of action for the Court to take would be to enshrine in due process, or at least in "first amendment due process," the following provision from the Model Penal Code, which was cited with approval in the *Cox* opinion:

> (3) A reasonable belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct, when:
>
> . . . .
>
> (b) [the defendant] acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.[324]

With regard to mistakes of law that cannot be blamed on government officials, three basic approaches to the problem can be imagined: (1) a requirement that actual knowledge of the law should be a prerequisite to conviction; (2) a negligence standard whereby failure to apply for a permit, or violation of the terms of an injunction, would be punishable only upon proof of either actual knowledge of the law or a negligent failure to be aware of or inquire about the law; (3) a firm application of the principle that ignorance of the law should be no defense.

324. MODEL PENAL CODE § 2.04(3)(b) (Tent. Draft No. 4, 1955), cited at 379 U.S. at 569 n.3.

With respect to direct criminal prosecutions for activities without the required permit, an application of the negligence standard would appear to be the best approach; indeed, it should be constitutionally required in such situations. A requirement of actual knowledge would be undesirable in that it would reward ignorance in an area in which familiarity with the law and advance efforts to communicate with city officials ought to be strongly encouraged. Also, an actual-knowledge standard would tend to complicate litigation—always a factor to be considered, although admittedly the consideration is not so crucial here as in the context of expedited litigation.[325]

On the other hand, prosecution of demonstrators whose ignorance of the law cannot be deemed at least negligent would seem to be unnecessarily harsh in light of the other adequate regulatory safeguards available to the city—particularly the standard criminal prohibitions.[326] Furthermore, there is a great potential for disruption and radicalization when the police attempt on-the-spot enforcement of a regulation against demonstrators who reasonably believe that they have not been given a fair opportunity to comply with the regulation. Thus, the first amendment should be read to require that at least reasonable—that is, nonnegligent—ignorance of the permit requirement be exculpatory.

The same constitutional principle should also apply to injunctions. The first amendment should not independently shield a demonstrator who negligently remains unaware of an injunction that binds him,[327] although most jurisdictions insist on actual notice as a matter of the law of equity.[328] A constitutional standard of negli-

325. *See* text accompanying notes 252-64 *supra.*

326. The self-help privilege, as developed herein, would shield demonstrators only from convictions for violating prior restraints. A comprehensive analysis of subsequent punishments for demonstrations might conclude that offenses such as breach of the peace, unlawful assembly, or obstructing public passageways, should be subjected to special constitutional limitations when demonstrators have sought to cooperate in advance with city officials or when spontaneity is justified. That, however, is a question of some magnitude and beyond the scope of this discussion. It is sufficient, for present purposes, to note that most self-help protest activities are not, apart from the prior-restraint aspect, unlawful. The one important exception to this generalization is when demonstrators cordon off a street, an action which would no doubt support a conviction for obstructing public passageways. That particular form of self-help, however, is so likely to cause serious disruption, and to lead to retaliatory "self-help" by drivers and pedestrians, that it ought to be absolutely prohibited.

327. Typically, this situation would arise only in the case of injunctions of the broad, class-action variety, although it is not an absolute requirement that a person have been a party to an injunction proceeding in order to be bound by the decree. *See Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1028-31 (1965).

328. *See, e.g.*, Hill v. United States, 33 F.2d 489, 490-91 (8th Cir. 1929); Garrigan v. United States, 163 F. 16 (7th Cir 1908); The Cape May & Schellinger's Landing R.R. Co. v. Johnson, 35 N.J. Eq. 422 (Ch. 1882). *See generally* Note, *Contempt Proceedings*

gence would probably have more impact when the mistake of law goes not to the existence of the injunction but to its interpretation. In that situation, there is a need to protect demonstrators against ambiguously or broadly phrased injunctions, especially in view of the temptations to employ such injunctions: drafting a narrow injunction can be a time-consuming process; when particularly notorious groups are the subject of the injunction, the city may understandably attempt to secure an open-ended regulatory weapon.

Thus, in both the injunction and direct-prosecution situations, "first amendment due process" should require that nonnegligent mistakes of law not induced by government officials be exculpatory, but apart from that states and municipalities should remain free to shape their own notice doctrines.

3. *The Spontaneous Demonstration*

The third situation in which an insistence on the use of advance channels rather than self-help may be unfair is that of the spontaneous demonstration. Earlier it was suggested that any exception to the demonstrators' obligation to give city officials the required advance notice—up to forty-eight hours—ought to be confined to exceptional cases in which unforeseen events of obvious importance make immediate protest efficacious.[329] Thus, by hypothesis, if the day after the intervention in Cambodia a student group wished to march in protest, a city should not be able to reject a permit request simply because there would not be forty-eight hours lead time. But should the students be permitted to march the day after the announcement of the invasion without attempting in the interim to secure a permit? Moreover, should the group be permitted to commandeer the streets *immediately* after the President's patriotic peroration?

As to the former question, the rule ought to be one that requires strict exhaustion of all available advance channels of relief—formal and informal. Even if the time factor would not allow for adequate deliberation on the permit request in terms of the substantive standards discussed above,[330] the bare notification that a demonstration is planned can be of great assistance to a city in formulating an orderly response to the event. Municipalities should thus be able to prosecute "spontaneous" demonstrators for failure to possess a permit

Against Persons Not Named in an Injunction, 46 HARV. L. REV. 1311 (1933); Note, *Criminal Contempt: Violations of Injunctions in the Federal Courts*, 32 IND. L.J. 514, 524-28 (1957).

329. *See* text following note 175 *supra*.

330. *See* pt. II. *supra*.

if there was any meaningful time period—two hours or more—during which the group could have *attempted* to get official permission to demonstrate, but failed to do so.

The literally spontaneous outpouring presents a far more difficult dilemma than the semi-spontaneous phenomenon just discussed. Emotions are likely to be at a summit of intensity such that any interference with the demonstrators by the police will ordinarily create an enormous risk of violence, yet, at the same time, the disruption potential in terms of competing public uses, uncontrollable lawlessness, and hostile backlash will usually also be at a maximum because of the element of surprise. Furthermore, it is probable that the choice of a legal doctrine is unlikely to influence behavior in these circumstances: no matter what first amendment principle is deemed controlling, the protestors will still take to the streets in these moments of passion, and the police will still make arrests when they believe that the demonstration is getting out of hand. If this perception is correct, the spontaneity issue—unlike almost all the other issues growing out of prior restraints on demonstrations—should be decided on the basis of fairness alone, with no attempt to erect deterrents and incentives. Surely there is little to be said for punishing the demonstrators for their failure to secure a permit, for if their behavior is truly spontaneous, such a failure certainly cannot be characterized as blameworthy. Admittedly, however, spontaneity is extremely difficult to establish or refute by way of convincing proof. This difficulty of proof could lead to the abuse of any self-help privilege for spontaneity; that is why the objective standard for spontaneity—"in response to unforeseen events of obvious importance"—is preferable to any subjective test.

4. *Inability on the Part of the Demonstrators To Secure Relief Through Advance Channels*

The fourth, and probably most important, situation in which self-help may be the only efficacious procedure for would-be demonstrators is that in which the protestors have made every reasonable effort to seek relief through advance channels and have not received by the time scheduled for the demonstration either the relief sought or a final determination—in the form of a Supreme Court ruling or denial of certiorari—of their legal claims. Since few, if any, demonstrations are planned far enough in advance to allow the case to wend its way up to the Supreme Court, the real issue here is whether the general disapproval of self-help is to be embodied as an unqualified

duty of obedience, subject to the few exceptions discussed above,[331] or merely as a requirement that the preferable advance remedies be exhausted before resorting to self-help. If one accepts the argument that the identity of the ultimate decision-maker is every bit as important as the applicable substantive doctrine,[332] it is apparent that this particular issue is of crucial significance.

A strong argument can be made that the Supreme Court has already opted for a rule of exhaustion rather than one of absolute obedience. As previously discussed,[333] this may be the explanation for the result in *Thomas v. Collins*.[334] Also, the *Walker* holding was sharply qualified:

> This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims. But there is no showing that such would have been the fate of a timely motion to modify or dissolve the injunction. There was an interim of two days between the issuance of the injunction and the Good Friday march. The petitioners give absolutely no explanation of why they did not make some application to the state court during that period.[335]

Moreover, the *Walker* majority distinguished an earlier case, *In re Green*,[336] on the ground that "[t]he petitioner in *Green*, unlike the petitioners here, had attempted to challenge the validity of the injunction *before* violating it by promptly applying to the issuing court for an order vacating the injunction."[337] It may also be significant that in neither *Howat v. Kansas*[338] nor *United States v. United Mine Workers of America*,[339] the primary doctrinal precedents for the *Walker* holding, had the contempt defendants exhausted their advance channels of relief. Finally, toward the end of the *Walker* opinion, the Court stated that "[the defendants] could not bypass orderly judicial review of the injunction before disobeying it,"[340]

331. *See* text accompanying notes 305-30 *supra*.

332. *See* pts. III. C.-D. *supra*.

333. *See* text accompanying note 314 *supra*.

334. 323 U.S. 516 (1945). Thomas made no attempt to vacate the injunction which was served on him in Houston six hours before his scheduled speech, but that could only have been done in Austin, 170 miles away—a round-trip of more than six hours in 1945.

335. 388 U.S. at 318-19.

336. 369 U.S. 689 (1962).

337. 388 U.S. at 315 n.6.

338. 258 U.S. 181 (1922).

339. 330 U.S. 258 (1947).

340. 388 U.S. at 320.

thus implying that an exhaustion of advance channels might justify disobedience. On the other hand, it should be noted that the Court's use in *Walker* of the phrase "delay or frustration of their constitutional claims"[341] could be interpreted as a studied omission of the word "rejection," and also that the *Howat* statement of the doctrine, cited with approval in *Walker*, tends to support an absolute-obedience interpretation: "until the decision of the [issuing court] is reversed for error by orderly review, either by the [issuing court] or a higher court, [its orders] based on its decision are to be respected and disobedience of them is contempt of its lawful authority, to be punished."[342]

This ambiguity concerning the true meaning of *Walker* ought to be resolved in favor of the exhaustion interpretation. As always, an overriding goal should be to encourage demonstrators to establish lines of communication with city officials.[343] A legitimation of self-help, holding out the promise of eventual acquittal on contempt or criminal charges, but conditioned on an exhaustion of advance channels, would seem to provide demonstrators with a powerful incentive to use those channels, even when they are skeptical about the possibility of obtaining direct relief. Any uneasiness about legitimating defiant behavior should be partially allayed by the fact that the normal criminal prohibitions would still be operative.[344] Moreover, it is important to keep in mind that the employment of self-help by demonstrators cannot be undertaken with reckless abandon; the tactic must remain a calculated gamble since the demonstrators will be acquitted of contempt or other criminal charges only if they prevail on the merits. It might even be suggested that the above factors, when added to the requirement of strict exhaustion, will result in a filtering process that will make virtually irrelevant the broad fears about a defiance mentality that underlie much of the general disdain for self-help.

In support of the absolute-obedience interpretation, on the other hand, one might point to the virtues of a clear, unequivocal legal duty. Such an argument is seriously undercut, however, by the prevailing doctrines which provide that an injunction may be defied when it has been issued by a court without jurisdiction,[345] and that a statute may be flouted when it is unconstitutional on its face.[346]

341. 388 U.S. at 318.
342. 258 U.S. at 189-90, cited at 388 U.S. at 314.
343. *See* text following note 281 *supra*.
344. *See* note 326 *supra* and accompanying text.
345. Walker v. City of Birmingham, 388 U.S. 307, 315 (1967).
346. *See* text accompanying notes 285-94 *supra*.

Furthermore, it is not even clear that one who attaches virtually exclusive significance to avoiding street confrontations should favor the absolute-obedience interpretation: "hard-core" dissenters will take to the streets no matter what the self-help doctrines are, but they may be more interested in keeping their demonstration orderly if they have hopes of prevailing on the merits. Moreover, if self-help is absolutely taboo, respectable dissenters are likely to stay away, leaving the battleground entirely to the more defiant demonstrators, whereas a conditional legitimation of the tactic may encourage those protestors capable of exercising a moderating influence to be present.

It might be suggested that the exhaustion interpretation ought to prevail only in those situations in which the exact proposed date of the demonstration has some special significance for reasons of symbolism, nationwide coordination, or whatever. The two best law review commentaries on the general problem of the duty to obey allegedly unlawful injunctions[347] both favor the exhaustion approach but would limit it to those instances in which "obedience would have subjected [the protestors] to significant and irreparable harm."[348] As with the consideration of reasonable alternatives in deciding the merits of a permit application,[349] however, it would be anomalous to allow judges to second-guess the protestors' own judgment concerning timing strategy, especially since it would seem that in cases in which demonstrators do not feel strongly about the target date, they would prefer to accept a delay in order to pursue further advance remedies, rather than to employ self-help at the risk of a contempt conviction if they were unsuccessful on the merits. Furthermore, attorneys charged with advising groups about their self-help rights might justifiably chafe at the prospect of having to calculate not only the odds of success on the merits, but also the odds of persuading the court of the special significance of the particular date. Thus, the simpler rule of a universal self-help privilege conditioned on a thorough exhaustion of all advance channels is much to be preferred.

To recapitulate, protestors faced with prior restraints should be required to exhaust all advance channels of relief before taking to the streets. This strict exhaustion requirement should govern regardless of whether the prior restraint is an injunction or a permit

347. Cox, *The Void Order and the Duty To Obey*, 16 U. CHI. L. REV. 86 (1948); Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626 (1970).

348. Note, *supra* note 347, at 642.

349. *See* text accompanying notes 61-69 *supra*.

requirement, regardless of whether the protestors' constitutional challenge is to the regulatory scheme "on its face" or "as applied," and regardless of how "transparently" unconstitutional the prior restraint may be. Self-help should be permissible only in a few specialized instances: (1) when the particular protest activity cannot constitutionally be subjected to any kind of a permit requirement *and* the government has not obtained an injunction either to restrain the activity directly or to enforce the permit requirement; (2) when the demonstrators are nonnegligently unaware of the existence or scope of the prior restraint, or act in reasonable reliance on an interpretation of the law given by a local official; (3) when unforeseen events of obvious importance make immediate protest efficacious; (4) when demonstrators have exhausted all available advance channels in the state court system and have not received by the scheduled date of the event either vindication or final determination of their constitutional claims.

IV. Conclusion

Prior restraints on demonstrations should be subjected to more vigorous constitutional scrutiny, both with regard to substantive standards and procedures. In the substantive realm, competing public uses should not be measured, as at present, by such open-ended terms as "reasonable," "undue," and "convenience," but rather should be quantified, albeit somewhat arbitrarily: it should be unconstitutional to prohibit a proposed demonstration unless the number of persons seriously inconvenienced (in terms of driving and pedestrian delays, and losses of access, parking, and quietude) exceeds the number of persons who would participate in the event, or unless the number of those inconvenienced in a minor way is grossly disproportionate to the number of participants. So long as this numerical balancing formula is enforced, municipalities should not be required to give different groups equal treatment with respect to the use of public land for mass demonstrations; it ought to be permissible to favor popular groups with a "speech surplus." On the other hand, a demonstration should never be prohibited because there are "reasonable alternatives" in terms of time and site available to the protestors. Per se prohibitions relating to time, place, size, and duration should be upheld only if, for the overwhelming majority of cases that fall within their ken, the municipal balancing formula would likewise justify prohibition.

Never should a demonstration be prohibited on the basis of the content of proposed speeches and placards, the fear of a hostile

audience, or the past conduct of the demonstrators. If it can be proved, however, that the demonstrators have a specific intent to engage in or provoke violence, that should be a sufficient ground for denying a permit or issuing an injunction. Also, injunctions against specific speeches and placards should be permissible if the content would be punishable, consistent with the first amendment, in subsequent criminal and civil proceedings, but such an injunction should never be a basis for prohibiting the entire gathering.

Municipalities should be able to prohibit gatherings on the ground that the demonstrators did not give notice or apply for a permit far enough in advance, but no advance-filing requirement of longer than forty-eight hours ought to be upheld, and cities should be required to allow spontaneous demonstrations when they are in response to unforeseen events of obvious importance. All advance-payment requirements (insurance, peace bonds, payment for police services) should be held to be violative of the first amendment, but a city should be able to require that the protest organizers make a good faith effort to raise funds at the event in order to defray the policing and clean-up costs.

In addition to these constitutional restrictions on the reasons that may justify prior restraints, the Supreme Court should subject demonstration regulation to the same procedural requirements now in force in the film censorship area. The city should always bear the burden of proof, except on the issue of how many participants are expected to take part in the demonstration. Permit schemes should be required to include a deadline for administrative action—such a deadline should be no longer than one week after the filing of the permit application, with a special provision that applications filed within a week of the proposed demonstrations be ruled upon by city officials at least twenty-four hours before the scheduled time for the event. The burden of initiating judicial proceedings should be on the city government, and local trial courts should be required to render a final decision within one week after the city's decision to go to court rather than grant the permit.

There should be no constitutional requirement of an administrative hearing; and when formal hearings *are* initiated at the administrative stage, judicial review should be of the de novo variety. Furthermore, appellate courts should make independent determinations of fact on the basis of the trial court record.

Demonstrators should be held to a strict duty to exhaust all advance remedies, subject to exceptions for activities that are totally immune by virtue of the first amendment from any sort of permit

requirement, for reasonable mistakes of law, and for spontaneous demonstrations. Once protestors have exhausted all advance channels, however, they should be allowed to claim their asserted rights by self-help.

These conclusions depend, to an inordinate extent, on predictions of behavior—predictions unsubstantiated by survey data or "interdisciplinary" documentation. As is true in almost every modern problem area, the issues that arise out of mass demonstrations must, of necessity, be resolved without the benefit of empirical knowledge. Until that situation is corrected, the choice is between careful guesswork and analytic paralysis. Readers who object—on general principle or on the basis of a particular philosophy of judicial review—to departure from the status quo in the absence of "hard" data may wish to treat this entire discussion as presenting an agenda for quantitative research rather than, as is intended, a program for immediate doctrinal reform. It may be, however, that today the process of constitutional innovation is itself working against a deadline.